

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JAMES KLEMIC, et al., Civil No. 3:1400041

Civil No. 3:1400041

Plaintiffs,

vs.

Harrisonburg, Virginia

DOMINION TRANSMISSION, INC.,

Defendant,

COMMONWEALTH OF VIRGINIA,

Intervenor. February 5, 2015

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MICHAEL F. URBANSKI
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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25 Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 THE COURT: Good morning.

2 Please call the case.

3 THE CLERK: Yes, Your Honor.

6 THE COURT: Good morning.

7 This case has been set down for argument on
8 motion to dismiss; also the motion to intervene.

9 I'm going to grant the motion to intervene
10 and allow the Commonwealth to intervene, given the
11 challenge to the constitutionality of 56-49.01 of the
12 Virginia Code.

22 As I indicated back in chambers, I intend to
23 write a written opinion on this issue, although as I
24 indicated to you all as well, I have read all the briefs
25 and I have studied -- read, I would say, virtually all

1 of the key cases involved in this issue.

2 So, let's hear first from the movant, and
3 that would be Dominion Transmission, I believe.

4 MR. WILBURN: Yes, Your Honor.

5 May it please the Court, my name is John
6 Wilburn. I represent Dominion Transmission, Inc., in
7 this matter and it comes on our motion to dismiss.

8 Your Honor, the issue before the Court I
9 won't suggest is a novel issue. It's an issue that's
10 been addressed by at least 25 states in 60 to 70
11 opinions. As the Court is aware, there's not a recent
12 opinion or at least a Virginia recent opinion on the
13 issue before the Court, which put simply, is whether the
14 entry for survey statute, 56-49.01, is either facially
15 unconstitutional or unconstitutional as applied.

16 THE COURT: Now, there has not been a
17 Virginia Court that has addressed this Virginia statute.

18 MR. WILBURN: That's correct, Your Honor.

19 THE COURT: Similar statutes have been --
20 similar statutes have survived these kinds of challenges
21 in many other states.

22 MR. WILBURN: In every other state, Your
23 Honor.

24 THE COURT: Is there a case that you're
25 aware of in the United States of America where a statute

1 similar to this, which is the entry for survey statute,
2 has ever been declared unconstitutional?

3 MR. WILBURN: There is not, Your Honor.

4 We've looked at the case law on the issue and as far as
5 we can find, it's about 68 to 0 in terms of
6 constitutional decisions on this. In every circumstance
7 where an entry for survey statute has been challenged
8 and litigated and opinion come out of that challenge,
9 the Court has found it to be constitutional.

10 THE COURT: And most of those cases are
11 Fifth Amendment cases; some Fourteenth Amendment,
12 procedural due process cases. Maybe a few touch on
13 Fourth Amendment issues.

14 MR. WILBURN: Predominantly Fifth Amendment.
15 There are a couple of due process. Typically, you don't
16 see due process because the majority of states that
17 enact these statutes have built into the statute some
18 mechanism for recovery of damages which precludes a due
19 process challenge.

20 THE COURT: And there's -- it's built into
21 the statute, too.

22 MR. WILBURN: It's built into the statute in
23 subpart B and it's built into 801-184.

24 But, Your Honor, to answer Your Honor's
25 question, the majority of Fifth Amendment takings

1 claims, there's a small subset of statutes where there's
2 a due process challenge where there wasn't a damage
3 remedy built into the statutory scheme. I think there
4 were one or two that were Fourth Amendment, but that
5 analysis hasn't any gained traction either.

6 THE COURT: Mr. Wilburn, I understand your
7 argument. For me to rule for the plaintiffs in this
8 case and say that this entry for survey statute is
9 unconstitutional would be to contravene a significant
10 body of case law from around the country.

11 MR. WILBURN: There's about 200 years of
12 jurisprudence that the Court would need to contravene.
13 This statute hasn't been specifically addressed, this
14 particular statute, 56-49.01, but other similar statutes
15 have and the concept is embedded in our common law. The
16 Attorney General's office cited a case that doesn't deal
17 with our statute, but which touches on the common law
18 application of the same issue. That's the S&W Railroad
19 Company decision at 104 Virginia 323. That's a 1905
20 decision. But in that case --

21 THE COURT: These decisions upholding the
22 right of a utility to go in and just to do the survey,
23 they go back to the early parts of the 19th century.
24 There's an 1830 case out of the Second Circuit that says
25 the common law allows folks to go in and do a survey.

1 They're not -- they're just going in temporarily to do a
2 survey.

3 MR. WILBURN: That's correct.

4 There's a U.S. Supreme Court decision that
5 goes back to 1984, which is the earliest statement we're
6 able to find, but there are cases that go back in other
7 jurisdictions even before that. You're correct.

8 The fundamental problem in all of the four
9 claims that have been asserted by the landowners is that
10 they presuppose the existence of property rights, and
11 the Supreme Court and every Court that's looked at the
12 issue has rejected to find, and that is that a landowner
13 possesses a property right that allows them to exclude
14 all others in all circumstances until there's a
15 condemnation --

16 THE COURT: Why shouldn't they be able to
17 keep people off their property? It's their property.

18 MR. WILBURN: They can keep people off their
19 property subject to certain privileges and exceptions
20 that are well codified in the statutes and recognized in
21 our jurisprudence, going back to the founding of the
22 country. Examples of that include fire and safety,
23 police officers coming on, emergency needs. But
24 principle among those --

25 THE COURT: The plaintiffs argue, well, this

1 isn't a fire and safety issue. This isn't a police
2 issue. This is somebody trying to make money by putting
3 a pipeline on my property.

4 MR. WILBURN: That's the argument, but the
5 argument sort of misses the point, which is the United
6 States Supreme Court and every Court that's looked at
7 this issue has held that a landowner doesn't have an
8 unfettered right to exclude all others. It just doesn't
9 exist. You certainly have a right to compensation if
10 there's going to be --

11 THE COURT: You have a Fourth Amendment
12 right against unreasonable searches and seizures of your
13 home.

14 MR. WILBURN: That's correct. But the two
15 critical words there are both unreasonable and seizure.
16 There's no case that's found that a temporary survey is
17 a seizure of a property right --

18 THE COURT: There are cases that say -- like
19 the gun case. I forget the name of that case. I think
20 it was -- may have been a Fourth Circuit case. That's
21 United States vs. Gray, Sixth Circuit, 1973. It's a case
22 in which, as I recall, there was a search warrant to go
23 into the house for alcohol. The guy was unlawfully
24 selling beer, I think, at a store down below and there
25 was a search warrant to go in and then when the police

1 were searching the place, they find some rifles. The
2 officer in that case takes the rifles from a closet,
3 carries them to the ground floor of the building where
4 he copies down the serial numbers.

5 The Sixth Circuit in that case says even
6 though that's temporary, it was a seizure of the serial
7 numbers because the guns were stolen and the guy was
8 charged with a federal firearms violation. So, even
9 though that was temporary in that case, the Court said
10 that was a seizure and the Sixth Circuit in that case
11 cites another case -- and I don't have the cite written
12 down -- about air-conditioners, in which there were
13 serial numbers on the air-conditioners. But, you know
14 the seizure in that case the way I read Gray and the way
15 I read that other case is it was a seizure of the serial
16 numbers. The search warrant didn't authorize them to go
17 in and take those serial numbers. That case seems to
18 suggest even a temporary going into the property might
19 give rise to a -- might give rise to a Fourth Amendment
20 claim.

21 What do you think about that Gray case?

22 MR. WILBURN: It gives rise to a claim in
23 that case, but the difference is one of the search was
24 not authorized. So the entering of the property was
25 authorized for a particular purpose, but not for the

1 purpose ultimately utilized by law enforcement, and the
2 Court relied on that fact.

3 THE COURT: One of the things, too, in the
4 Gray case, the case does not assess the issue in the
5 Fourth Amendment, the critical issue in the Fourth
6 Amendment, and that is the reasonableness of the search
7 or seizure. It's got to be an unreasonable seizure.

8 MR. WILBURN: It's two components. It's
9 unreasonable and --

10 THE COURT: Illegal and a seizure, to
11 violate the Fourth Amendment.

12 MR. WILBURN: Right, and what occurs here
13 under the statute is, as a matter of law, not
14 unreasonable because it's authorized by statute and the
15 concept is consistent with the Commonwealth. So you
16 don't have the unreasonable element. You also don't have
17 the seizure element. The seizure element, the police in
18 the Sixth Circuit case, actually took the numbers which
19 the gun owner, illegal or otherwise, had a possessory
20 interest at the time, and they took them and utilized
21 them. The Court found it was both unreasonable and a
22 seizure. In the instant case, the access, every Court
23 that's looked at it said it's not unreasonable. It's
24 consistent with the police power and consistent with the
25 common law which has existed for several hundred years.

1 So you don't have unreasonable.

2 THE COURT: Would it be an unreasonable
3 seizure in this case were this pipeline to go across the
4 curtilage of a home? In other words, some of these
5 landowners have large parcels of property. The
6 plaintiffs in this case, I can't remember whether it's
7 three or more, but the parcels involved are unlike the
8 Presley case out of Charlottesville. These are large
9 parcels of property; okay? If the pipelines were to go
10 across the curtilage, would that give rise to a claim
11 for an unreasonable seizure under the Fourth Amendment?

12 MR. WILBURN: It would not, for several
13 reasons. The first is --

14 THE COURT: The Fourth Amendment addresses
15 curtilage.

16 MR. WILBURN: It does address curtilage, but
17 before a pipeline could be constructed within the
18 curtilage or otherwise, there has to be an issuance of a
19 CPCN, a Certificate of Public Convenience and Necessity,
20 which is a finding the project is in the public interest
21 and is appropriate. Then there has to be a
22 condemnation. There would have to be a condemnation to
23 acquire those rights. You can't access the property to
24 construct it in the curtilage or elsewhere until you
25 acquired those rights. If you acquired the rights and

1 compensated, it can't be an unreasonable access.

2 The second reason it wouldn't is federal law
3 governs the location of pipelines in relationship to
4 homes.

5 THE COURT: But you haven't told them where
6 this pipeline is going to go across their properties.
7 They have asked for and you have not given them any
8 suggestion as to where on their property Dominion is
9 going to go. Don't you think these landowners are
10 entitled to know where you're going to be coming in and
11 where this proposal is before you just willy-nilly walk
12 on their property?

13 MR. WILBURN: Your Honor, they're entitled
14 to know where we're going on their property. Where the
15 pipeline is going to go -- and that's sort of where the
16 argument the landowners assert is backwards. In order
17 to construct the pipeline, you have to obtain approval
18 from FERC. That's the CPCN. In order to obtain
19 approval from FERC, you have to submit an application --

20 THE COURT: I understand that, but you know
21 now, you have an idea now as to where this pipeline
22 might go; right?

23 MR. WILBURN: We --

24 THE COURT: Otherwise, you wouldn't have
25 given notice to these landowners, right?

1 MR. WILBURN: We have an idea we believe it
2 might go in a corridor study area, which is a relatively
3 wide area.

4 THE COURT: Shouldn't you tell these
5 landowners and shouldn't your notice let these
6 landowners know which part of their property that
7 Dominion is interested in looking at, rather than just
8 saying we're giving you notice and we refuse to tell you
9 where it's going to go? Shouldn't you be required to let
10 them know where on the property the pipeline is going?
11 And my question goes to this to your motion to dismiss,
12 okay? The absence of those facts as to where on the
13 property the pipeline might be located and where on the
14 property these folks would walk for the entry upon
15 survey, okay, because I don't have that fact, can I
16 reach it at the motion to dismiss stage? Because I
17 don't know where on Mr. Klemic's property, this big
18 parcel -- how do I know whether it's going near the
19 house or near the curtilage? So for a Fourth Amendment
20 claim, at this stage, without more facts, how do I know
21 whether it's not an unreasonable seizure?

22 MR. WILBURN: Because on a facial
23 constitutional challenge, it's not dependent upon the
24 facts.

25 THE COURT: Facial constitutional, but he's

1 also saying as applied and he pled both facial and as
2 applied.

3 MR. WILBURN: Right. As applied --

4 THE COURT: He may have abandoned one in his
5 brief, but he certainly pled both.

6 MR. WILBURN: He's pled both.

7 Facial, it doesn't matter. You look at the
8 statute. As applied, there's a ripeness issue under
9 Williamson County. You can't pursue an as applied
10 constitutional violation unless two things occur. One,
11 the statute or regulation that allegedly deprives you of
12 a property right lacks a remedy and this has a remedy
13 built into it and that's the Fourth Circuit decision we
14 cited, the Doe decision, which is on point. It's also
15 the Williamson County decision, which the U.S. Supreme
16 Court held you can't bring an as applied Fifth Amendment
17 takings claim unless and until there's been an
18 application for and denial of compensation under the
19 state process.

20 THE COURT: How does that jive with the
21 Patsy case where the Supreme Court said in Patsy that
22 there is no requirement of exhaustion before a plaintiff
23 can bring a 1983 suit? Obviously, that was a different
24 case. It was a Title VII claim. But isn't -- how do you
25 square Patsy with these other Fifth Amendment cases, for

1 example, where you say you don't have a claim until
2 there's a finality and you go through the state process?

3 MR. WILBURN: I think that's easily
4 reconciled because in the Patsy decision, there was not
5 a statutory remedy, remedial process built into the
6 statute. There was an alleged deprivation of a
7 constitutional right, but it wasn't a deprivation of a
8 property right for which there are multiple state
9 remedies that are developed. So, I agree with the
10 position taken by the plaintiffs in a portion of their
11 brief, but there's no Williamson County exhaustion
12 requirement if there are no available state remedies,
13 and that's the Patsy decision that he cites.

14 THE COURT: He says this, just for the sake
15 of argument. He argues this. I've got no remedy. I've
16 got no remedy because the taking here, he argues, is the
17 coming onto my land, okay? And the statute only provides
18 compensation if there's damage. He says the
19 constitutional violation is the allowing these people to
20 walk and do their survey on my land. He says there's no
21 remedy for that. So, how do you deal with that, Mr.
22 Wilburn?

23 MR. WILBURN: Well, it presupposes a taking,
24 which presupposes a property right to exclude all
25 others. But counsel's argument relies only on the

1 damage section of 56-49.01(b). There's another
2 provision which is ignored in that argument. That's
3 801-184, which is sort of the kick-off in the inverse
4 condemnation process.

5 THE COURT: Can you get inverse
6 condemnation? If they just walk on your property and get
7 their little thing on the tripod that does the survey
8 and they just walk across the corner of the property and
9 do their little survey and don't damage anything, do you
10 have an inverse condemnation claim?

11 MR. WILBURN: It's not that -- it's not an
12 inverse condemnation claim because there's no taking of
13 a property right. That's the problem. Counsel's
14 conflating the idea that there's a property right with
15 lack of remedy and they are two separate concepts.
16 Presupposing that there's a property right that's taken,
17 and all of the case law says what Your Honor described
18 is not a taking, but assume that there is. He's got
19 remedies both under subsection B of the applicable
20 statute and under 801-184. So, there are remedies
21 available and those remedies preclude bringing an as
22 applied constitutional challenge. That's sort of
23 working back to the Court's original question.

24 So, no facts are necessary in the first
25 instance because it's a facial constitutional challenge.

1 You never get the facts in discovery.

2 THE COURT: Let me ask you a different
3 question. Do I need to even get to any of this? Do I
4 need to get to the merits of the Fifth Amendment of
5 whether there's a taking? Do I need to get to the merits
6 of a procedural due process claim? Do I need to get to
7 the merits of a Fourth Amendment unreasonable seizure
8 claim in a case where there is not one allegation in the
9 complaint that Dominion Transmission is a state actor?
10 There is not one word in the complaint that says
11 Dominion is a state actor. Therefore, under 1983, how
12 is there any facts upon which the Court can find a claim
13 under 1983, because under 1983, it's got to be state
14 action?

15 MR. WILBURN: Correct.

16 THE COURT: There's nothing. I have read
17 the complaint many times. There is not one word in this
18 complaint that says that Dominion Transmission is a
19 state actor.

20 MR. WILBURN: I agree with that.

21 The problem here is the plaintiff has
22 pleaded inconsistent allegations. Number one, they
23 don't plead we're a state actor although they brought
24 four 1983-based claims. Later in the complaint and
25 throughout their opposition papers, they argue the

1 motivation is private pecuniary business gain, which
2 would be inconsistent with the third factor the Supreme
3 Court set out in establishing whether you're a state
4 actor. The plaintiff can't plead that this is all about
5 private pecuniary activity and at the same time, bring
6 federal constitutional claims. Those constitutional --

7 THE COURT: By the same token, how can you
8 argue that you're not a state actor, but yet, that this
9 pipeline, if approved -- big if -- by the folks in
10 Washington at the federal Energy Regulatory Commission,
11 would serve a public purpose? Is your argument
12 inconsistent?

13 MR. WILBURN: It's not. We don't argue
14 that. What we write in our papers, if you accept their
15 position, then the constitutional claims must fail. I
16 think the reasonable reading of the facts that are
17 alleged and the correct reading is we're operating under
18 the Natural Gas Act. We're empowered by the Natural Gas
19 Act. We're governed by FERC --

20 THE COURT: Natural Gas Act, which says
21 there's a public purpose. 371.

22 MR. WILBURN: That's correct. It's right in
23 the language. If you look beyond that, then you can
24 look at East Tennessee Natural Gas against Sage --

25 THE COURT: He says wait a minute, wait a

1 minute. You don't have a public purpose because you
2 don't have a permit from the FERC yet. There's no
3 public purpose here by going on the property because you
4 don't have a permit yet.

5 MR. WILBURN: That's wrong, for a whole lot
6 of reasons. The first is he's conflating the public
7 purpose limitation and the article in Section 11 of the
8 Virginia Constitution with the requirements of 46-49.01,
9 which don't relate to condemnation and don't require
10 public purpose.

11 When you look at the statute, the purpose of
12 a statute is to facilitate the projects of this type
13 under 15 U.S.C. 717A, which is the Natural Gas Act.
14 Subpart I says the studies are necessary to satisfy any
15 regulatory requirements. We've cited the regulatory
16 scheme. In order to get to that CPCN that establishes
17 the project as a public use, you have to submit the
18 studies at issue in this case and that's found at 15 CFR
19 157 -- actually, I think it's 18 CFR 157 and 380.

20 The point I'm trying to make on this, Your
21 Honor, is that the Natural Gas Act says that it is in
22 the public purpose. In order to condemn, we have to get
23 that certificate that says the project as reviewed and
24 approved and engineered is in the public convenience a
25 necessity. But there's nothing that requires us to have

1 that determination from FERC at this stage in the
2 process, which is merely surveys. And in fact, you
3 would never have that determination from FERC at this
4 stage in the process because the surveys needed to get
5 there are exactly what this entry for survey statute is
6 written to allow.

7 THE COURT: Let's hear -- anything else you
8 want to argue?

9 MR. WILBURN: No, Your Honor.

10 THE COURT: I may have gotten that cite
11 wrong. I said 741. The provision in the Natural Gas Act
12 is 15 U.S.C. 717A.

13 MR. WILBURN: But it says right in that
14 section it's in the public interest, is the language.
15 The point the landowners make -- they set up an
16 impossible problem to solve. They suggest to the Court
17 it's not in the public interest until you have the CPCN.
18 But you can't get the CPCN until you do the studies
19 authorized by 56-49.01.

20 THE COURT: Why didn't, as part of your
21 notice, why didn't you let these landowners -- give them
22 some idea as to where this -- you've got to know what
23 you're thinking about. You've plotted this route
24 through all these counties, through another state going
25 down. You've got -- you have to know, in some general

1 sense, where across these properties these pipelines are
2 going to go. And shouldn't you give these landowners
3 some idea whether it's going to be close to their house,
4 right next to their house, way down across the pasture,
5 way down across the hill? Some of these properties are
6 hundreds of acres. Shouldn't you be required -- the
7 statute doesn't say you have to do that, but shouldn't
8 you have done that?

9 MR. WILBURN: Well, sort of outside, I
10 think, the argument, but I can represent to the Court
11 that that's exactly the type of thing that we have done
12 with landowners. We've offered all sorts of conditions
13 --

14 THE COURT: They say in their brief you've
15 refused.

16 MR. WILBURN: Your Honor, I'll disagree with
17 that and I'll represent to the Court that we've made
18 every effort, and this is more in terms of how you
19 resolve these problems as opposed to constitutional
20 requirements.

21 THE COURT: Have you filed suit in state
22 court against these folks, the plaintiffs in this case?

23 MR. WILBURN: Not against the plaintiffs in
24 this case. We have respected the fact they've filed this
25 action and are awaiting a decision by this Court on this

1 action before we move forward.

2 THE COURT: Have you filed suit against
3 other landowners seeking Court approval under this
4 statute?

5 MR. WILBURN: We have, Your Honor.

6 THE COURT: In those suits, have you told
7 the landowners where across their property you might be
8 interested in building this pipeline?

9 MR. WILBURN: I don't think it's referenced
10 in those suits. I don't believe it is, Your Honor.

11 THE COURT: It just seems to me if these
12 folks have land and this is at the very initial stages
13 of trying to determine -- this pipeline may never be
14 built. This pipeline -- and that's not up to me.
15 That's up to other folks. But seems to me you ought to
16 let them know where on your property you're thinking
17 about doing this.

18 MR. WILBURN: Your Honor, I agree with that
19 and I don't want to suggest there's a legal requirement,
20 but I will represent to the Court, and it's outside
21 these papers, the company has had open houses. They're
22 willing and have offered to meet with any landowner.
23 They've offered to show them in any way they want. The
24 reality here is that we have firm no's from hundreds of
25 people and firm no's that are without regard to any

1 conditions of duration or where it is or what we do.
2 These are firm no's that simply say we don't want the
3 pipeline project coming at all, anywhere. So certainly
4 we're arguing about the access statute. But this is not
5 a circumstance where the company has ignored landowners
6 and refused either to meet with them, explain with them
7 or agree to reasonable conditions on access.

8 THE COURT: I don't know. I just know in his
9 brief that Mr. Walters argues the pipeline company has
10 refused to tell them where across the property these
11 folks are interested. That just seemed to me to be an
12 unreasonable position.

13 MR. WILBURN: It's not something we
14 addressed because it was outside the pleadings.

15 THE COURT: It is outside the pleadings and
16 it may not be an issue for me to deal with at all.

17 MR. WILBURN: But I can tell the Court and
18 if anybody is in the courtroom and other attorneys here
19 and they want to know or talk or sit down, we tried for
20 a period of months before instituting any of these
21 actions to do exactly that.

22 What is really going on here is, it's a no,
23 a hard no, not now, not ever, and that's why we're
24 before the Court.

25 THE COURT: Anything else you'd like to say,

1 Mr. Wilburn?

2 MR. WILBURN: No, Your Honor.

3 THE COURT: Let's hear from the
4 Commonwealth.

5 MR. RAPHAEL: Good morning, Your Honor.

6 Stewart Raphael for the Commonwealth.

7 We intervened in this case to defend the
8 constitutionality of the statute as a facial matter.
9 We're not here to defend this particular project.

10 THE COURT: You argue in your brief though
11 with regard to as applied, it's unripe.

12 MR. RAPHAEL: That's exactly right. It is
13 unripe because it's undisputed Dominion has not gone on
14 the property. We do agree with Dominion's counsel that
15 under Williamson, the claims are not ripe until they've
16 attempted to exhaust their state law remedies for that.

17 I think the answer to your question, by the
18 way -- how do you square Williamson and Patsy, is that
19 the cause of action for a taking of property or taking a
20 property without due process, the cause of action
21 involves the failure to provide process and state law is
22 the process that is provided and that's why --

23 THE COURT: No process in Patsy -- of
24 course, they said you didn't exhaust your state
25 remedies, in Patsy.

1 MR. RAPHAEL: Right.

2 There's actually a similar case that went up
3 to the Supreme Court from the Fourth Circuit I was
4 involved with at the cert stage. It was Doe v. Virginia
5 State Police, and the issue there, a lady had been
6 convicted of a sex offense and after she was convicted,
7 she was put on the sex offense registry and wanted to
8 get off. She said I've got no process because I was put
9 on the registry after my conviction. We argued
10 successfully she wasn't entitled to process in that
11 situation because the fact of the conviction alone meant
12 that she went on the registry and the legislature was
13 entitled to make that categorical determination. But
14 the same argument was made there. There was a failure
15 -- we were alleging a failure to exhaust --

16 THE COURT: The Supreme Court denied cert in
17 that case.

18 MR. RAPHAEL: That's correct.

19 But the Commonwealth intervened because
20 although we're focused here on this natural gas --

21 THE COURT: Your argument is not focused on
22 this project. You don't have a dog in that hunt. Your
23 argument is you believe this particular statute is
24 constitutional.

25 MR. RAPHAEL: That's exactly right.

1 If the Court were to declare this statute
2 unconstitutional, it would also, we think, result in
3 declaring the other entry for survey statutes
4 unconstitutional, 56-49 and 25.1-203, which is the
5 statute that all localities and state government use to
6 get on property for survey purposes pre-condemnation.

7 What I'd like to do in my argument today --
8 I know Your Honor is very well prepared. I'd like to
9 respond to what I think are the four arguments that were
10 raised in the brief that the plaintiffs filed on Monday,
11 which is the last paper the Court got.

12 THE COURT: Right. I read that.

13 MR. RAPHAEL: Their first argument is that
14 takings cases involve very fact specific inquiries --

15 THE COURT: United States v. Place says the
16 intrusion on possessory interest occasioned by a seizure
17 of one's personal effects can vary both in nature and
18 extent.

19 MR. RAPHAEL: They make the argument under
20 the takings clause jurisprudence, too. It's very fact
21 specific. But I'd like to echo what the Court said
22 earlier. The only claim that's ripe here is the facial
23 challenge. You have to distinguish the facial challenge
24 from the as applied challenges. The as applied
25 challenges should be dismissed without prejudice. If

1 Dominion goes too far with this particular property,
2 they can bring a claim later. The as applied claim
3 would be dismissed without prejudice.

4 THE COURT: Do you think they can bring a
5 claim later? Let's say they go too far. What do you
6 mean when you say they go too far? What do you mean?

7 MR. RAPHAEL: I don't know what facts might
8 suggest they would go too far. For example, if they
9 brought a bulldozer into the curtilage in the dead of
10 night.

11 THE COURT: The statute doesn't allow them
12 to bring anything other than a hand tool. No power
13 equipment.

14 MR. RAPHAEL: That's exactly right.

15 THE COURT: They can't bring a weedeater
16 with a battery. They can bring a shovel maybe and some
17 of those lopper kind of things, but they can't bring any
18 power equipment. They can't bring any vehicles.

19 MR. RAPHAEL: That's right.

20 But my point is --

21 THE COURT: My question I'll ask the
22 plaintiff is, where's the taking?

23 MR. RAPHAEL: That's exactly right.

24 But any of those hypotheticals would be an
25 as applied challenge and that's just not ripe. If it

1 ever happens, if they can come up with any scenario, if
2 it ever happens, they can bring the case back.

3 With regard to the facial challenge, the law
4 is clear that a facial challenge cannot succeed unless
5 the statute is unconstitutional in every application and
6 that's the well established Solerno line of authority,
7 Washington State Grange vs. Washington State Republican
8 Party, 552 U.S. 442. There's an en banc Fourth Circuit
9 case that makes the same point. That's Richmond Medical
10 Center vs. Herring, 570 F.3d 165, where the Court said
11 the statute has to be wholly unconstitutional for all
12 circumstances. That was 570 F.3d 165, at page 169.

13 So the facial challenge here clearly fails
14 as a matter of law.

15 The second point the plaintiffs make in
16 their reply is that they respond to the very long line
17 of authority that we pointed out in our Exhibits 1 and 2
18 to our intervention brief. We pointed out that
19 literally every state has an entry for survey statute of
20 some kind. Our Exhibit 2 listed all of the cases that I
21 could find --

22 THE COURT: Has there ever been a case that
23 you're aware of in your exhaustive research, and I
24 looked at Exhibits 1 and 2 to your brief, where a Court,
25 federal or state, any kind of Court has held that a

1 statute allowing a natural gas company or a public
2 utility to go in and do a survey violates the
3 constitution, a state constitution or the federal
4 constitution?

5 MR. RAPHAEL: The Property Reserve case in
6 California, there was a Court of Appeals decision. It's
7 cited in our Exhibit 2. The Court of Appeals said that
8 as applied, the state went too far in what they were
9 doing. They drilled, for example, 200-foot holes,
10 filled them with concrete. They had mechanized
11 equipment. They did things that you couldn't do under
12 the Virginia statute. That case is on appeal to the
13 California Supreme Court. The briefing is underway now.
14 When the Supreme Court of California granted review in
15 that case, it vacated the Court of Appeals decision. So
16 it's no longer citable.

17 THE COURT: Is that a facial challenge or an
18 applied challenge?

19 MR. RAPHAEL: I read it as an as applied
20 challenge. It was not a challenge to the statute on its
21 face.

22 So, the answer to your question is I'm not
23 aware of any case that has struck down one of these
24 statutes facially. If somebody goes too far or abuses
25 the privilege -- just like, by the way, common law. We

1 point out in our brief, Section 211 in the Restatement
2 of Torts --

3 THE COURT: You go back a ways.

4 MR. RAPHAEL: Yes, sir.

5 There's a common law privilege to go on
6 property for survey purposes pre-condemnation. But as
7 Comment G points out, if you abuse the privilege, if
8 it's unreasonable, you're liable for trespass. That's
9 kind of analogous to the point that in an as applied
10 challenge, if you go too far, you could have a claim.
11 But that's not before the Court today.

12 The plaintiffs try to distinguish this very
13 long line of consistent authority on our side by saying,
14 well, it was all overruled sub silentio by Loretto, in
15 1982. That's the cable case.

16 THE COURT: The New York cable TV case.

17 MR. RAPHAEL: Right.

18 They said Loretto sub silentio overruled all
19 those cases.

20 A couple responses to that. First of all, I
21 take that point as a concession that they recognize
22 there is no common law right to exclude in all
23 situations, let alone in the situation of a
24 pre-condemnation survey. There's no response to our
25 Virginia law and common law arguments in their papers.

1 The next point I'd make on that, there's
2 really nothing in Loretto to support that notion.

3 THE COURT: The deal in Loretto is
4 permanent.

5 MR. RAPHAEL: It was permanent, that's
6 right.

7 THE COURT: The first line of the Loretto
8 opinion says this case presents the question whether a
9 minor but permanent physical occupation of an owner's
10 property authorized by government constitutes a taking
11 of property for which just compensation is due under the
12 Fifth and Fourteenth Amendment of the Constitution.

13 Then at the end, on page 441, the Supreme Court says,
14 our holding today is very narrow. I think this may have
15 been Justice Marshal, as I recall. I read so many cases,
16 it's hard to keep them all straight. Our holding today
17 is very narrow. We affirm the traditional rule that a
18 permanent physical occupation of the property is a
19 taking.

20 Sure, if they were to come in and put a pole
21 up or do something, that's a taking. But just to come
22 in and do a survey on a temporary basis, I think Loretto
23 is distinguishable.

24 MR. RAPHAEL: That's exactly right.

25 Sierra Tahoe was the case where there was a

1 32-month moratorium on any construction and the Court
2 said that wasn't too long. Permanent is permanent. It's
3 for a very long time.

4 THE COURT: Even though -- the issue there
5 was it was just cable boxes.

6 MR. RAPHAEL: That's right.

7 THE COURT: Or some sort of wires and stuff,
8 yeah.

9 MR. RAPHAEL: That's right.

10 The other thing I'd point to in Loretto is
11 footnote 12 at page 435 of the opinion.

12 THE COURT: Hold on. Let me pull it up. I
13 have them all right here.

14 MR. RAPHAEL: On page 435.

15 The Court in that footnote says in the
16 second sentence, not every physical invasion is a
17 taking, right? So the fact that this is a physical
18 invasion does not make it a taking. It has to be
19 significantly more than that. In Loretto, it was a
20 permanent physical invasion.

21 THE COURT: He argued though physical
22 invasion cases are different from a regulatory taking.

23 MR. RAPHAEL: And they are.

24 THE COURT: So you agree with him.

25 MR. RAPHAEL: I agree that physical invasion

1 cases are different from regulatory taking cases.

2 We make two points in our brief. One is
3 that there is no right to exclude in this situation.
4 There's no common law right. That's the no property
5 right argument. The other argument we make is assuming
6 for the sake of argument that there is a right to
7 exclude in this situation, that there is a property
8 right, the intrusion is sufficiently de minimis that
9 under PruneYard, it doesn't rise to the level of a
10 taking. But I think doctrinally, the better answer --

11 THE COURT: PruneYard is a very different
12 case. PruneYard is the leafleting case at the mall in
13 California.

14 MR. RAPHAEL: It is. But what's similar,
15 the Court in PruneYard says -- there, there was a right
16 to exclude. There was a common law right to exclude.

17 THE COURT: And the California Supreme Court
18 said First Amendment overcomes that.

19 MR. RAPHAEL: The California constitution
20 gives leafleters a right. PruneYard said yes, you've
21 taken the right to exclude in that situation, but it's
22 not sufficiently a big deal in that context to
23 constitute a compensable taking.

24 Sure, there are factual differences between
25 PruneYard and this case, but the common denominator is

1 it's a minimal minor intrusion compared to the use of
2 the property.

3 THE COURT: Can I make that judgment in the
4 challenge, the facial challenge that's alleged here? Or
5 do I need facts?

6 MR. RAPHAEL: Yes, you can make that
7 judgment on a facial challenge because remember, their
8 burden is to show the statute is unconstitutional in
9 every application. So clearly, there are going to be
10 situations where the utility spends just moments on a
11 piece of property.

12 THE COURT: You're saying as applied is not
13 right.

14 MR. RAPHAEL: That's exactly right.

15 THE COURT: What about the Presley case?

16 MR. RAPHAEL: The case out of
17 Charlottesville?

18 THE COURT: Folks owned some property along
19 the Rivanna River. City of Charlottesville and some
20 foundation that does trails issues a map that shows a
21 trail running across Ms. Presley's property and so --
22 she's not there. She's off taking care of her ill
23 parent, I think. She comes to find these people have
24 been camping and trashing her property and they made
25 this trail across there. And the Court in that case

1 finds a Fourth Amendment violation, does it not?

2 MR. RAPHAEL: Yes, it does, but the case
3 factually is completely distinguishable. Number one, in
4 Preston (sic), there was a property right.

5 THE COURT: Presley.

6 MR. RAPHAEL: Presley.

7 There was a property right. She has a right
8 to keep people off her property.

9 THE COURT: Don't these folks have a right
10 to keep people off their property?

11 MR. RAPHAEL: Not for all purposes. That's
12 the Section 211 of the Restatement. There are 20
13 privileges listed in the Restatement.

14 THE COURT: The thing I found interesting
15 about your brief and your argument is just how well
16 established in the law this ability to come on and
17 survey has been. I mean, it goes back to the beginning
18 of the foundations of American jurisprudence.

19 MR. RAPHAEL: That's exactly right.

20 THE COURT: When you cite Henry St. George
21 Tucker -- for goodness sake.

22 MR. RAPHAEL: It's very similar to what you
23 read in Justice Douglas's opinion in Causby.

24 THE COURT: That's a very interesting case.

25 MR. RAPHAEL: And a great opinion.

1 He says to think a landowner would have the
2 ability to prevent people from flying over the property
3 over the Romanesque notion that your property extends to
4 infinity would defy common sense.

5 THE COURT: Causby, the thing that -- Causby
6 is interesting. You have a guy with a chicken farm in
7 Greensboro, North Carolina. Then you have the
8 government coming in and building an airport there in
9 1942 during World War II and all these big bombers are
10 coming over the guy's chicken farm and they say it's a
11 taking under the Fifth Amendment. I don't remember
12 whether it was procedural due process or not in that
13 case, a due process claim, but the thing that was
14 interesting to me is what the opinion says. It says,
15 page 259: The result was the destruction of the use of
16 the property as a commercial chicken farm. It was
17 destroyed. The poor chickens couldn't lay eggs because
18 of all these airplanes. The opinion -- both you and
19 Dominion cites the planes were buzzing the property and
20 leaves were flying off. It says, page 266: Flights
21 over private land are not a taking unless they are so
22 low and so frequent as to be a direct and immediate
23 interference with the enjoyment and use of the land.

24 I guess you would argue somebody coming in
25 on a one-time basis, doing a survey, without vehicles,

1 without power tools, just doesn't rise to the level of
2 Causby.

3 MR. RAPHAEL: That's right.

4 The right to fly at a reasonable altitude is
5 one of the 20 exceptions in the Restatement. It's
6 Section 194 in the First Restatement. It was moved in
7 the Second Restatement. That's exactly what you're
8 talking about.

9 I want to make sure I finish answering your
10 earlier question about the Fourth Amendment and Preston
11 (sic). So, the first distinction is that there's no
12 property right here where there was there. The second
13 distinction is that the Court assumed in Preston because
14 the property was only three-quarters of an acre on the
15 Rivanna River, the Court assumed that the people were
16 intruding into the curtilage.

17 THE COURT: Well, the Fourth Circuit's
18 opinion uses the word "yard."

19 MR. RAPHAEL: It does. That's exactly
20 right. Whereas the property there was three-quarters of
21 an acre, here, the three plaintiffs have properties that
22 are 196 acres, 30 acres and 101 acres.

23 THE COURT: Doesn't that go directly to my
24 question that I asked Mr. Wilburn about? We don't know
25 where these guys wants to put the pipeline. We don't

1 know how close to the house they want to put it because
2 they haven't told them.

3 MR. RAPHAEL: I can't say anything about
4 what they have or haven't told the landowners because
5 that's not what I'm here to do. But I would say, Your
6 Honor --

7 THE COURT: If they're given notice they
8 want across the property, they ought to tell these folks
9 what part of the property they're interested in.

10 MR. RAPHAEL: Certainly that would be a
11 prudent business judgment to make. I'm not disputing
12 that.

13 THE COURT: You're saying not doing it
14 doesn't make the statute unconstitutional.

15 MR. RAPHAEL: That's true.

16 The other point I'm trying to make is that
17 for Fourth Amendment purposes, there's no allegation
18 here that the intrusion is within the curtilage and
19 unlike Preston, the facts just don't support that
20 inference. In any event, it doesn't matter because the
21 question is the facial challenge because a facial
22 challenge would involve a theoretical intrusion both
23 into the curtilage and open field. Certainly the open
24 field claims are not subject to a Fifth Amendment
25 allegation.

17 But what about the notion that Presley talks
18 about a temporary seizure can give rise to a Fourth
19 Amendment violation?

20 MR. RAPHAEL: Again, three points.

21 There's no property right here to begin
22 with. The right to exclude somebody surveying
23 pre-condemnation is not a recognized property right
24 under the common law or under Virginia law.

25 THE COURT: You're saying they've never had

1 it.

2 MR. RAPHAEL: That's exactly right.

3 THE COURT: So you're not taking anything
4 they never had.

5 MR. RAPHAEL: That's exactly right.

6 THE COURT: The Commonwealth always assumed
7 that a utility has the right to come on your property
8 and look to see whether or not, at the end of the day,
9 the public interest, the public purpose would be served
10 by putting a road in or a sewer or anything like that.

11 MR. RAPHAEL: Yes. That's Section 211
12 Comment C and Table Two from our brief. Every state has
13 one of these statutes.

14 THE COURT: I guess your point is if they
15 never had that property right, there's nothing being
16 taken by this statute.

17 MR. RAPHAEL: That's exactly right. That's
18 the first point.

19 The second point is the Fourth Amendment
20 doesn't apply outside the curtilage.

21 THE COURT: We don't know if it's in the
22 curtilage because they haven't told them.

23 MR. RAPHAEL: Yes, but this is a facial
24 challenge only and because it doesn't apply outside the
25 curtilage, there's no way they can win a facial Fourth

1 Amendment challenge.

2 THE COURT: Do we need facts to address
3 that? Do I need facts?

4 MR. RAPHAEL: No. Because a facial
5 challenge requires the Court to think of every possible
6 application and unless a statute is unconstitutional in
7 every application, it's not unconstitutional. That's
8 the nature of the facial challenge.

9 The third reason there's not a Fourth
10 Amendment claim here is that even assuming there were
11 property rights, and even assuming the Fourth Amendment
12 applied, this would not be an unreasonable seizure
13 because the statute lays out a procedure for how the
14 survey is done. Notice has to be given. It's limited in
15 purpose.

16 THE COURT: No motorized vehicles. No power
17 equipment.

18 MR. RAPHAEL: That's exactly right.

19 And this is not a criminal law enforcement
20 matter. That doesn't mean the Fourth Amendment is
21 inapplicable. But it does mean that there's no
22 presumption in favor of a warrant when there's not a
23 criminal law involved. And it would be really
24 unreasonable to expect a utility or a city or a county
25 to have to get a warrant from a magistrate before

1 conducting a survey for pre-condemnation to see if they
2 need to put a line in.

3 So, for all of these reasons, the Fourth
4 Amendment doesn't apply.

5 The third argument that the plaintiffs made
6 in their reply on Monday, they want to distinguish
7 between this statute and the other entry for survey
8 statutes by saying, well, this one requires a FERC
9 license which you don't have yet. I think that, too, is
10 an acknowledgement there is really no limiting principle
11 to their position. They do make an interesting
12 concession at page six of their brief where they say the
13 entry for survey idea makes good sense, quote: In order
14 to ensure that the sovereign takes no more than is
15 necessary, surveying antecedent to condemnation makes
16 good sense for both the sovereign and the citizen. Well,
17 I read that and thought that's an amazing concession.

18 THE COURT: That's pretty much the whole
19 point of the statute.

20 MR. RAPHAEL: It is, but then I realized,
21 are they conceding you don't have to pay in that
22 situation? I'm not sure they are. I would ask the Court
23 to press counsel, are they taking the position the other
24 statutes are unconstitutional or not because I don't
25 think they're clear about that.

1 With regard to their attempt to distinguish
2 this statute from the other ones, the idea there's an
3 additional government prerequisite is not a good basis
4 to distinguish them, and let me tell you why. Under the
5 other statutes, Your Honor, for example 56-49, the entry
6 for survey statute for public service companies, if the
7 statute provides in section two that until a utility has
8 been granted a territory by the State Corporation
9 Commission or issued a certificate of public need, it is
10 not allowed to condemn property. But it is allowed to
11 go on for survey purposes. That's an example of a
12 governmental precondition. You can't take it yet, but
13 you can go on for survey purposes. So, the fact there's
14 a precondition there doesn't render the entry for survey
15 right unlawful.

16 Another example would be in 15.2-1903B.
17 That's the statute that requires a locality to have a
18 public hearing before it can actually take property, and
19 that's obviously a good idea to make sure it hears from
20 everybody who has an interest in it before it actually
21 takes the property. But even before it has that public
22 hearing, it can go on land for survey purposes under
23 25.1-103, yet another governmental precondition, before
24 you can actually take the property that doesn't render
25 the entry for survey right invalid.

1 The fact that FERC requires a certificate
2 for public need, that's a good government idea, right,
3 to make sure this line is really needed and they conduct
4 a comprehensive environmental analysis. If a
5 landowner's property is in the line, they can go to FERC
6 and say this is a terrible idea for the following
7 reasons.

12 MR. RAPHAEL: Yes.

13 But the point is --

14 THE COURT: You're agreeing with my
15 incapacity.

16 MR. RAPHAEL: A federal judge can do an
17 amazing number of things.

18 THE COURT: I can't do that. I agree with
19 my incapacity.

20 MR. RAPHAEL: My point is it's kind of a
21 chicken and egg problem. A utility can't get the permit
22 until it shows where the line is going to go and it
23 can't show where the line is going to go until it gets
24 on the land to do a survey.

25 THE COURT: Isn't the point of this statute,

1 sure, it helps the utility if indeed there's a public
2 purpose, if indeed it's shown this pipeline is going to
3 be built. But it also helps the landowner because it
4 helps avoid wetlands and helps avoid historic things.
5 Some of these folks have Civil War or other cemeteries
6 on their properties. Those things need to be
7 identified. It helps avoid environmental concerns and
8 all kinds of stuff.

9 MR. RAPHAEL: That's exactly right, and I
10 think they concede that on page six of their reply.

11 The last point they made in their reply
12 brief on Monday, they say that the entry for survey
13 statute here can be distinguished from other ones
14 because here's, there's no police power justification.
15 I think Your Honor addressed that with Mr. Wilburn.
16 Obviously, the General Assembly exercised its police
17 powers when it enacted this statute to allow a natural
18 gas company to have entry for survey rights in order to
19 determine where to put the line so that they could apply
20 for their federal approval.

21 THE COURT: You say it's a chicken and an
22 egg problem. He says you have to have the chicken
23 first. He says you have to have the certificate of need
24 and a demonstrated public purpose from the FERC and then
25 you can go on the property. Otherwise, there's no

1 public purpose.

2 MR. RAPHAEL: That's right.

3 THE COURT: But I don't know how you do
4 that.

5 MR. RAPHAEL: That's exactly right. That's
6 why you have an entry for survey statute. In fact, as
7 we point out in our brief, most courts hold that the
8 utility has this right even in the absence of a statute
9 because it would render the condemnation power useless
10 without it. The only cases that have denied an entity
11 entry for survey rights -- we point this out in our
12 brief. I think there are three state courts that did it
13 and that's simply because the particular entity there
14 didn't have statutory rights. That is the minority
15 viewpoint.

16 THE COURT: It's not an issue here because
17 there's a statute.

18 MR. RAPHAEL: That's exactly right.

19 So, I want to end by coming back to what I
20 think is really the key issue in this case and that is,
21 is there a property right to exclude? I think all of the
22 counts rise or fall based on that issue on a facial
23 challenge.

24 As we point out, the Restatement identifies
25 20 privileges at common law where there was not a right

1 to exclude. One of them is in Section 211, acting
2 pursuant to a governmental authority, and specifically
3 includes the right of a utility to go on land
4 pre-condemnation. That rule is fully consistent with
5 Virginia law. At page ten of our brief, we set out of
6 the history of Virginia statutes showing there have been
7 entry for survey statutes in Virginia dating to the
8 founding of the Commonwealth. We also cited -- Mr.
9 Wilburn mentioned the Southern and Western Railway case
10 from 1905, which is perfectly consistent with the
11 privilege. That's the case where a railroad tried to
12 stop another railroad for coming on the property for
13 survey pre-condemnation and the Supreme Court of
14 Virginia said no, there's no actual damage alleged and
15 your remedies are limited to the condemnation
16 proceeding. So, they're 100 percent consistent with
17 this common law privilege that we're talking about.

18 We also cited the Sansotta case from the
19 Fourth Circuit, 2013.

20 THE COURT: That's the Nags Head case.

21 MR. RAPHAEL: That's exactly right.

22 The important point about Sansotta and Lucas
23 -- Lucas is the Justice Scalia opinion.

24 THE COURT: I read it.

25 MR. RAPHAEL: He does a wonderful job of

1 laying out the law about how the Constitution does not
2 confer property rights. You have to look to state law.

3 THE COURT: Property rights are a matter of
4 state law. There's no question about that. Taking a
5 property right without just compensation is the Fifth
6 Amendment. But property rights are traditionally a
7 matter of state law; that's right.

8 MR. RAPHAEL: That's exactly right.

9 The plaintiffs in their reply on Monday
10 cited an additional case that I don't think anybody
11 cited yet.

12 THE COURT: What page is that?

13 MR. RAPHAEL: I don't recall what page it's
14 on, but the case they cited is South Carolina State
15 Education Assistance Authority vs. Cavazos. It's 897
16 F.2d 1272. They cite from the Fourth Circuit 1990.
17 They cite this case for the proposition the right to
18 exclude is one of the sticks in the bundle of rights.
19 But when you look at the page they cite, it actually
20 reinforces this point about you have to look at state
21 law.

22 What the Court said at page 1276 of the
23 opinion, it says the essential aspects of private
24 property are for use and enjoyment of --

25 THE COURT: Hold on one second. Let me pull

1 that case up while you're talking about it.

2 Page 1276?

3 MR. RAPHAEL: Yes. It's after III, the
4 paragraph that reads "the essential aspects."

5 THE COURT: I've got it.

6 MR. RAPHAEL: So, the essential aspects of
7 private property are for use of enjoyment and disposal
8 and the right to exclude others, citing Ruckelshaus. As
9 explained in Ruckelshaus, such property interests are
10 created and their dimensions are defined by existing
11 rules or understandings that stem from an independent
12 source such as state law.

13 That's perfectly consistent with what
14 Justice Scalia lays out in Lucas. You've got to look at
15 state law to see --

16 THE COURT: Lucas is that Isle of Palms
17 case.

18 MR. RAPHAEL: Yes.

19 THE COURT: This guy wanted to build houses
20 on his property and South Carolina enacted an statute
21 that said you can't do it. He said it rendered his
22 property valueless and was this a taking of private
23 property under the Fifth and Fourteenth Amendment. This
24 is what Lucas says the plaintiff relies on. Page 1015.
25 In general (at least with regard to permanent

1 invasions), no matter how minute the intrusion and no
2 matter how weighty the public purpose behind it, we have
3 required compensation.

4 So, his point is, if you come in and you
5 don't damage, you just walk on my property, he argues
6 that is a taking and there's no compensation under the
7 statute, so it violates the Fifth Amendment. And he
8 relies on Lucas and Loretto.

9 Tell me why he isn't right.

10 MR. RAPHAEL: Because Lucas says you have to
11 look at whether you had that right to begin with and you
12 don't. This is not one of the sticks in your bundle.
13 Just like you don't have the right to stop the airplane
14 from flying overhead, right, like the Court said in
15 Causby. The world would come to a crashing halt if you
16 had that kind of right. You don't have the right to
17 stop the police officer from apprehending the fleeing
18 felon on your property or to stop the sheriff from
19 serving process or to stop the motorist from coming on
20 your property when a tree falls on the road and prevents
21 him from continuing on the road. Those are the
22 exceptions laid out in the Restatement, which are
23 perfectly consistent with Virginia law. It is not a
24 stick in the bundle to begin with. That's the point of
25 Lucas.

3 THE COURT: Lucas -- Isle of Palms, South
4 Carolina, just north of Charleston.

5 MR. RAPHAEL: Sansotta follows Lucas. The
6 Town of Nags Head declared a bunch of houses nuisances
7 because the beach had eroded.

11 MR. RAPHAEL: Right. And the town said you
12 have to tear down the house and the Fourth Circuit said
13 it's not a taking because under North Carolina law, you
14 don't have the right to maintain your property as a
15 nuisance, so you get paid zero.

16 This case is not anything like that case.
17 It's not dramatic like that case is. But the underlying
18 legal point is the same. There is not an underlying
19 property right here to exclude and that's Section 211C
20 of the Restatement.

21 As in Sansotta, there's no reason to think
22 the right to exclude applies here. That's why there's
23 no taking claim, why there's no due process violation
24 and why there's no Fourth Amendment violation.

25 THE COURT: Thank you for that, Mr. Raphael.

1 Mr. Walters, it's your turn.

2 MR. WALTERS: Thank you, Your Honor.

6 MR. WALTERS: I'll be glad to, Your Honor. I
7 know the Court is going to have a lot of questions. I'll
8 start and the Court can sort of direct me where I go.

9 I can't tell you how many hundred cases I
10 read before I filed the case. I'm not trying to make a
11 proffer, but I obviously knew coming in people would
12 say, oh, there are all these cases. Let me start right
13 there.

14 With all due respect to the arguments of
15 counsel, there is, in fact, a fundamental right in this
16 stick of bundles to exclude other people on your
17 property. That's what makes it America. That's what
18 makes it private property.

19 THE COURT: What about all the law that is
20 attached in the appendix dating back all the way in the
21 Restatement that says look, this is not part of your
22 property right? A utility always has the right to come
23 on. This is back from -- I'm looking at Tom Cooley.
24 They named a law school in Michigan State after him.
25 1888, a treatise of the law of torts. It says, so the

1 statutes which permit lands to be taken for public
2 purposes may provide for preliminary surveys in order to
3 determine the necessity for any particular appropriation
4 and thus providing the license and entry on the land for
5 that purpose. That's more than a hundred years ago.

6 MR. WALTERS: I completely agree and I'm
7 happy to address that question.

8 Part of the problem here is the sort of glib
9 way, you know, 65 cases spanning 150 years are cited.
10 The real issue is you have a fundamental right to
11 exclude others. We completely agree there are exceptions
12 to that rule.

13 THE COURT: 1868, statute called or a book
14 called A Treatise on the Constitutional Limitations
15 Which Rests upon the Legislative Power of the States of
16 the American Union. Page 560. No constitutional
17 principle, however, is violated by a statute which
18 allows private property to be entered upon and
19 temporarily occupied for the purpose of a survey and
20 other incipient proceedings with a view to judging and
21 determining whether the public needs to acquire the
22 appropriation or not and if so, what the property
23 location shall be and the party acting under the
24 statutory authority would not have been found to make
25 compensation for the temporary possession nor be liable

1 to action of trespass.

2 Wouldn't I have to be turning more than
3 100 years of jurisprudence of this country on its head
4 to agree with you?

5 MR. WALTERS: No, Your Honor, because one
6 very simple reason. This statute does not require there
7 be incipient condemnation proceedings, that condemnation
8 proceedings be contemplated or that condemnation
9 proceedings ever occur. The point we tried to make in
10 our brief, Your Honor, if what you are saying is yes,
11 I'm going to condemn some portion of this property --

12 THE COURT: They're not doing it because, as
13 you say, they want to build a road to a resort or
14 something. The whole reason they want to do this is
15 because they want to build a pipeline.

16 MR. WALTERS: That may be, Your Honor, but
17 the statute doesn't require that. The statute says
18 and/or on to conduct a survey to satisfy regulatory
19 requirements, to select the most advantageous location
20 or route, the improvement or straightening of its line
21 or works, changes of location or construction or
22 providing additional facilities. It doesn't say only if
23 you're going to be condemning land to put in a pipeline
24 project or an overhead utility line.

25 THE COURT: But it's a natural gas company.

1 That's why they're doing the survey. They're doing
2 something for a natural gas company. They're not
3 building a tennis court.

4 MR. WALTERS: The statute says to construct
5 facilities.

6 THE COURT: For the selection of the most
7 advantageous location or route, the improvement or
8 straightening -- that's what they're doing.

9 MR. WALTERS: Changes of location --

10 THE COURT: They're coming in to decide, you
11 know, what's the most advantageous location or route. I
12 understand why all your clients and all these folks here
13 don't want a natural gas pipeline to go across their
14 property. I understand that. So, the question is
15 though -- first, let me ask you this question.

16 Are you making an as applied or a facial
17 challenge, because it's a little hard to discern from
18 your pleadings?

19 MR. WALTERS: Justice Roberts might suggest
20 there's really no distinction between --

21 THE COURT: He's way smarter than I am.

22 MR. WALTERS: He's way smarter than I am,
23 but I don't always agree with him though that there may
24 be a distinction.

25 I believe, Your Honor, we have pled an

1 attempt to make both, which is as applied statute
2 requires no connection to condemnation proceedings,
3 eminent domain proceedings, anything like that
4 whatsoever. It simply says a natural gas company can
5 come on your property to conduct surveys, to provide
6 additional facilities, engage in construction, change
7 location, straighten its line if it were so inclined.
8 It can come on to do that. No requirement there be
9 eminent domain proceedings.

10 THE COURT: Doesn't the statute assume --
11 isn't this statute for the benefit -- why should a
12 company have to go ahead and start eminent domain
13 proceedings before they know where the line is going to
14 go? That just makes no sense.

15 MR. WALTERS: Well, Your Honor, I think the
16 General Assembly would disagree. There are three sort
17 of procedures in Virginia. There is what's called the
18 quick take and what's called the slow take and I guess
19 this statute is probably the no take proceeding.

20 THE COURT: I agree with you this may be no
21 taking.

22 MR. WALTERS: We'll get to that. I'm not
23 saying that. I'm saying no taking procedures.

24 In 25.1-223, which is the slow take statute,
25 that Dominion says we can't use the quick take statute,

1 we have to use the slow take statute, that statute has
2 been in the Commonwealth for decades. Here's what
3 happens.

4 THE COURT: So has this one. This statute
5 has been there back to the beginning of the 20th
6 century.

7 MR. WALTERS: This statute has only been
8 there since 2004.

9 THE COURT: But various iterations, if you
10 believe the Commonwealth's brief.

11 MR. WALTERS: I don't necessarily believe
12 the Commonwealth's brief in that respect, Your Honor.
13 In others, they would argue similar and I would argue
14 dissimilar context that existed.

15 If I might indulge this for a minute,
16 because it answers the Court's questions about doesn't
17 this make sense. 24.1-223, which is the slow take, says
18 here's how it works. You file your condemnation
19 petition. Then within 21 days, unless the Court
20 shortens the time, then you can apply to this Court to
21 go onto somebody's property and --

22 THE COURT: But that statute doesn't have
23 anything to do with this whole process with the FERC.
24 It doesn't have to do with the Natural Gas Act. It
25 doesn't have to do with interstate gas pipelines.

1 MR. WALTERS: It was to address the Court's
2 question of does it make sense. Is it the only way to
3 do this? No. For a long time, the Commonwealth has said
4 in respecting that right, how you do it when you're
5 going to condemn property.

1 that, as if that had some definitive meaning when it's
2 done pre-condemnation doesn't result in a taking.

3 First off, you have to determine what is
4 meant by surveying. To put the point I'm trying to make
5 here in context, there's a case that Dominion cited,
6 Oglethorpe Power vs. Goss, from the Georgia Supreme
7 Court. Like many of these cases, it cites nary a
8 federal case. So you have to look at all these
9 surveying cases in the context of, well, it may not be
10 relevant what Georgia's state law is on these issues.
11 But it's very careful to say a couple things I think
12 carry throughout all these cases.

13 First off, when there is going to be a
14 condemnation proceeding, which 56-49.01 does not require
15 at all, when there is going to be one, then to allow
16 this antecedent surveying makes sense because there's
17 ultimately going to be a hearing. There's going to be
18 an establishment of a purpose. There's going to be
19 availability to damages remedy and in that context, yes

20 --

21 THE COURT: If a pipeline ever gets built,
22 they'll have all that.

23 MR. WALTERS: And if it doesn't get built,
24 it won't.

25 THE COURT: If it doesn't get built on the

1 property, where's the taking?

2 MR. WALTERS: The taking occurs when five
3 teams of people march across the property, clearing
4 property, digging holes --

5 THE COURT: Let's say this statute could be
6 accomplished with two people and a tripod, a survey.

7 Walk across your property. You're telling me two folks
8 with a surveyor's tripod, walking across the property,
9 constitutes a constitutional taking for Fifth Amendment
10 purposes.

11 MR. WALTERS: When it's not antecedent to a
12 condemnation proceeding, yes, sir.

13 THE COURT: Isn't it -- how can you say it's
14 not antecedent to a condemnation proceeding when the
15 whole point of this is decide where to put the pipeline?
16 Or if a pipeline can even be put in?

17 MR. WALTERS: This, Your Honor, gets to the
18 12(b)(6) stage, which is what facts can we assume versus
19 what facts are pled and what facts are people arguing in
20 their briefs before we get to the right state in this
21 case.

22 I would go back to the extent it's a facial
23 challenge, Your Honor --

24 THE COURT: Let's just talk about the second
25 line of your complaint. Dominion Transmission is

1 presently engaged in efforts to extend an interstate
2 natural gas pipeline through the Commonwealth of
3 Virginia. The proposed route extends through Nelson
4 County. You've alleged this. Of course, that's what
5 this is all about. Now you want to say, no, no, no, no,
6 you've got to put the chicken before the egg.

7 Does that really make any sense?

8 MR. WALTERS: It certainly does from my
9 chicken coop, Your Honor. I'll try to explain why.

10 THE COURT: It depends if there's a big
11 airplane flying over it.

12 MR. WALTERS: Part of the thing is a whole
13 bunch of things are getting mixed and I don't want to go
14 down too many sidetracks, but Causby and Kaiser Aetna
15 deal with what is permanent and what is not.

16 THE COURT: This is a very different case
17 from Causby and Kaiser Aetna. In Causby, the Supreme
18 Court says the chicken farm had permanently been
19 disabled. In Kaiser Aetna, these folks own a pond in
20 Hawaii, and there's a little berm or beach or some land
21 in between the bay and the pond. So what they do is
22 they develop this pond into a marina and they cut a hole
23 in the berm so that boats can come in from the bay. The
24 federal government comes in and says, a-ha, it's now
25 navigable servitude, we're going to let everybody in.

1 And the landowners say we want to charge \$72 a month per
2 year for these folks to come in and do that and you've
3 taken something from me. The Court said yeah, in that
4 case, there's a navigable servitude on private property,
5 and it was done permanently. They couldn't charge
6 anymore. That's way different from this case.

7 MR. WALTERS: I would respectfully disagree
8 with respect to the question of permanence.

9 First off, the Court was clear to point out
10 in Kaiser that there were no facilities constructed by
11 the federal government whatsoever. So there was no
12 physical occupation by the government at all.

13 THE COURT: But the federal government took
14 their ability to charge -- they took the marina
15 developers' ability to charge a fee. They took that
16 away. It was really a regulatory taking case.

17 MR. WALTERS: I disagree. I think what the
18 Court described there, they took away the marina owners'
19 right to exclude others, which is --

20 THE COURT: They wanted to charge a fee for
21 it.

22 MR. WALTERS: That was not an issue in the
23 Court's decision.

24 THE COURT: The importance about Kaiser
25 Aetna is it's permanent. Here, all you're talking about

1 is letting the gas company, without motor vehicles,
2 without power equipment, come on and see, does it make
3 sense or does it not make sense to locate a pipeline on
4 this property. That's far different from a situation
5 where something is permanently taken from you, at least
6 in my view.

7 MR. WALTERS: I want to back up to this
8 thing because what was taken permanently in Kaiser was
9 the right to exclude others. How that was going to be
10 taken, as the Court indicated, people wouldn't be able
11 to use the facilities if they entered the marina. The
12 public would simply be allowed to paddle over the water
13 and then paddle back out of the pond. That's our
14 position, Your Honor, is that Kaiser Aetna, as I read
15 it, stands for the proposition that taking the right to
16 exclude others on a transient basis by people paddling
17 across your property amounts to a taking.

18 I see the Court doesn't agree with that
19 analysis.

20 THE COURT: The United States government
21 from Kaiser Aetna permanently took the right that these
22 people had to use the development that they created to
23 charge people for it. It was permanently taken away
24 forever. They couldn't do it. This is a statute that's
25 consistent with the common law that allows people to

1 come on and survey your property. I think Kaiser Aetna
2 is distinguishable because of the permanence. I think
3 Causby is distinguishable because of the permanence. I
4 think Loretto is distinguishable because of the
5 permanence.

6 Is there one case that you can cite where a
7 Court has held that a survey statute like this
8 constitutes facially a violation of the Fifth, Fourth or
9 Fourteenth Amendment? One case in the United States.

10 MR. WALTERS: I'm unaware of a case that
11 says a survey statute like this makes no requirement of
12 condemnation proceedings is --

13 THE COURT: You're ducking my question. My
14 question is this. Has there ever been a Court in the
15 United States of America to hold a survey statute is --
16 gives a utility the right to come in to a property just
17 to do a survey, is a taking under the Fifth Amendment,
18 is an unreasonable seizure under the Fourth Amendment or
19 a violation of procedural due process under the
20 Fourteenth Amendment? And the answer to the question is
21 there is none. There's never been a case that holds
22 that.

23 MR. WALTERS: Your Honor, I'm not trying to
24 duck the question. I'm trying to make sure I answer it
25 carefully, which is perhaps what lawyers do.

1 THE COURT: There's never been a case in
2 which a Court has held the way you want me to hold; that
3 this survey statute violates the Fifth, the Fourteenth
4 or the Fifth Amendment of the U.S. Constitution.
5 There's not been one decision you can cite that supports
6 that; is that correct?

7 MR. WALTERS: Other than the California case
8 that's on appeal, Your Honor.

15 So my question is this, Mr. Walters. Aren't
16 you asking me to break new ground?

17 MR. WALTERS: No. You may not like my
18 answer any different than when I tried to give it a
19 couple minutes ago, because I don't see grounds either
20 way here that's being broken, Your Honor. The statutes
21 say, as many of these statutes do, the entry of survey
22 statutes cited by the defendants --

23 THE COURT: Every state has one.

24 MR. WALTERS: Most of them say antecedent to
25 a condemnation proceeding. The fact patterns when you

1 read them talk about pending positions or applications
2 that are going to be filed. This statute is permanent.
3 It doesn't say for the next six months or whatever. It
4 says in perpetuity. Natural gas companies can come on
5 your property if they meet these following criteria.
6 Sure, on any given occasion, it may be more or less
7 days. We're getting a little bit into as applied.
8 There's no requirement there be condemnation
9 proceedings, that there be a pipeline, that there be
10 anything like that. I think that is why this is not
11 breaking new ground.

12 THE COURT: But that's inconsistent with
13 your own pleadings. Your own pleadings say the whole
14 point here is to do this pipeline.

15 Let me ask you a different question. I
16 understand your point. I understand your point.

17 You don't plead a state action at all in
18 this document and don't I have to dismiss it because
19 1983 requires state action? It's not pled. There's not
20 one word about state action in this complaint. I've
21 read it. My question to you is could you point me out
22 where you pled state action in this case?

23 MR. WALTERS: Sure. I did not plead the
24 conclusion of state action. I pled a private party that
25 is exercising powers is traditionally the sole province

1 of the sovereign, which is the right to take, to come on
2 your property and use it for their business purposes.

3 THE COURT: Ah, interesting. Paragraph 35.

4 You say Dominion may exercise the power of eminent
5 domain to acquire private property for the project only
6 after receiving a certificate for public needs.

7 So, doesn't that mean in paragraph 35 that
8 you say that the Dominion Transmission company only is a
9 state actor acting pursuant to eminent domain? Because
10 you say in another part of your argument, there's no
11 eminent domain. Isn't therefore de facto no state
12 action? I'm trying to understand what you're pleading.

13 MR. WALTERS: Sure. I understand that's
14 Dominion's argument. My position is this --

15 THE COURT: That's what you said. You said
16 in paragraph 35, they can exercise the power of eminent
17 domain, and that's the only place in here that seems to
18 me at all to suggest any state action. You say they get
19 their right pursuant to eminent domain. That's the
20 state action. But we're way before eminent domain here.
21 Therefore, I don't see where you pled state action. So
22 don't I have to dismiss this complaint? The question is
23 whether I give you leave to amend.

24 MR. WALTERS: I would certainly request
25 leave to amend, Your Honor. I would not think the Court

1 has to. Again, I will try to answer the Court's
2 question. Whether I answer it satisfactorily or not
3 remains to be seen, that what the defendant is doing,
4 coming upon property, asserting it has the right to do
5 so pursuant to a particular statute, that right of a
6 private person to come on my property, again, as in this
7 case, for a utility project, exists in only one way.
8 That's the sovereign's right to take property for public
9 use, provided compensation is paid.

10 Eminent domain, and perhaps I was a little
11 too cute, I used in the sense of eminent domain
12 proceedings, there are statutes and there are
13 regulations that govern how you exercise that right.
14 That right they are exercising to come on my property
15 and do this, which I as a private citizen would have no
16 right to do, exists only through their stepping into the
17 shoes of the sovereign. It's the 21st Century and the
18 sovereign doesn't supply natural gas anymore.

19 THE COURT: Your argument they're state
20 actors and your argument there's no public purpose here,
21 is that argument inconsistent?

22 MR. WALTERS: No, Your Honor.

23 What they are doing is state action, coming
24 on my property. To say they have no valid basis for
25 doing that doesn't make it -- how convenient. Whenever

1 it turns out there's no constitutional basis for doing
2 it, it's not constitutional because their basis for
3 doing it was an improper basis. What they are doing is
4 condemning the property. They aren't using eminent
5 domain proceedings. I did not view them as inconsistent.
6 I'll be the first to say that pretty much every moot
7 presentation of this I have done, I've been asked
8 exactly that question and invited to perhaps articulate
9 that point a little more clearly. I'm attempting to do
10 that here.

11 What they are doing is what only the
12 sovereign traditionally can do. That's take away my
13 property rights, provided it compensates me.

14 THE COURT: What property right are they
15 taking away by surveying?

16 MR. WALTERS: The right to exclude others
17 from the property.

18 THE COURT: What Supreme Court case or other
19 case supports the notion that a temporary right to
20 exclude others for the purpose of a survey violates the
21 Constitution of the United States?

22 MR. WALTERS: As phrased, Your Honor, I'm
23 not aware of one.

24 THE COURT: I'm not either and I've read a
25 lot of these cases because this is a fascinating issue.

1 These cases are really fun because they involve all
2 kinds of -- I mean, the cases I've read -- the chicken
3 and the airplane case and the Hawaii and New York cable
4 TV case. They involve all kinds of interesting factual
5 issues and I understand the importance of this case. I
6 understand how strongly folks feel about this. I
7 understand about people feeling strongly about their
8 property that they own, that they've paid for and lived
9 on and not wanting these folks to come on it. I
10 understand that. And that's why I'm spending a lot of
11 time making sure we get this right.

12 Let me ask you another question. Mr.
13 Raphael argues that any as applied challenge is not ripe
14 because nothing has been taken yet. What would you say
15 to that? No one's come on your property yet.

16 MR. WALTERS: The cases we cited in our
17 brief on this point, Your Honor, are Naegele and
18 National Outside Advertising. You simply pass a statute
19 that says, guess what, in five-and-a-half years, we're
20 taking your billboard and, oh, by the way, we're not
21 going to pay you for it because we gave you an
22 amortization period. The Fourth Circuit said not only
23 was that ripe the minute that statute was adopted, it
24 was so clear that it was ripe that those of you who
25 waited five-and-a-half years until the action took your

1 billboard were three-and-a-half years too late. So if
2 the statute says we're taking it, it's ripe when the
3 statute says that it's being taken. The fact that the
4 government makes no effort to even exercise that right
5 for another five-and-a-half years --

6 THE COURT: Isn't this different? Like in
7 Naegele, for example, the billboard case out of Durham,
8 there was a sign ordinance prohibiting these billboards
9 except for along the highway. They said in that case,
10 we're not going to pay compensation because your
11 billboards are in a different place and the advertising
12 company said, look, you're taking away my ability to
13 economically use my property to put up a billboard.

14 In this case, the statute does provide for
15 compensation. If there's damage done to the property,
16 then the statute requires payment of compensation.

17 MR. WALTERS: Your Honor, the statute -- and
18 everybody likes to label things opposing counsel says as
19 some sort of concession, so I'll make sure I just phrase
20 this as a hypothetical thought as I go along. If you
21 look again -- my senior partner used to tell me, Mr.
22 Walters, please finish one sentence before you start the
23 next one.

24 In the Oglethorpe case, one of the justices
25 who dissent there refers to his dissent in an earlier

1 case, and dissents aren't worth anything other than
2 indicates other judges might perhaps agree with what I'm
3 saying, saying this may all be fine if when the company
4 came in, yeah, here's 100 bucks for surveying. You
5 determine what the fair market rental value of that
6 right. If my neighbor said, Neal, I want to have my
7 barbecue on your yard, it's a very nice yard, and I
8 said, fine, pay me 50 bucks, let me have some barbecue
9 and you can use it, there is a value for what's being
10 taken here. The statute says all we have to pay for is
11 actual damages, which is a term of art, which means if
12 you cut down a tree, figure out the trees you're going
13 to cut down, pay that in first. I realize that's the
14 dissent. But there is something being taken, Your
15 Honor. That's the right of my wife to look out the
16 window in the morning and not see a bunch of guys
17 traipsing across the yard that's her yard, digging holes
18 and she goes out and they say, we're just the gas
19 company, don't mind us. We all understand there's that
20 very important right to us to keep other people off our
21 property. There are exceptions to that rule. Yeah, if
22 the house is on fire, the firemen can come in. If my
23 son is a felon, the police can come in, but generally
24 speaking --

25 THE COURT: But what you're arguing, there

1 are exceptions, but you're ignoring the fact the
2 exception that is contemplated in the statute has been
3 recognized in the common law for more than a hundred
4 years. And you just want to say the firemen can come in
5 and the police can come in. But just as those folks can
6 come in, the common law has always allowed this kind of
7 right to survey. And it makes sense because why would
8 you want to have to go through a condemnation proceeding
9 and put a pipeline in, in a place that's not suited to
10 it? The reason for the survey is to see whether or not
11 this is even going to work.

12 MR. WALTERS: This goes back that Virginia
13 has for years said unless you're coming on the quick
14 take way, here's how it works. File your condemnation
15 case and then get permission from the Court to go on the
16 property. Whether you label it concession or not, I
17 would completely agree, it is a matter of common sense
18 you don't want to take more than necessary, but that
19 doesn't lead to, oh, it's always constitutional to come
20 in, in advance and do that and it particularly doesn't
21 lead to the conclusion that it's constitutionally
22 acceptable when you're not even going to file a
23 condemnation proceeding. I completely agree if you're
24 going to condemn the property and the quick take statute
25 says that and other courts and other states have said,

1 yes, if you're going to condemn the property, there's
2 good reason. Again, I don't mean to keep hammering on
3 Oglethorpe --

4 THE COURT: You would agree that if this
5 statute said the gas company is limited to doing this in
6 contemplation of an eminent domain proceeding or in
7 contemplation of a condemnation proceeding, then the
8 statute would be constitutional.

9 MR. WALTERS: Since Your Honor is trying to
10 get a concession out of me --

11 THE COURT: No, you're making the argument
12 that this case is different because there's no pending
13 condemnation proceeding. All I'm asking is if this
14 statute said there was a contemplated condemnation
15 proceeding, is the statute similarly unconstitutional,
16 in your view? I'm just trying to understand what your
17 view is.

18 MR. WALTERS: It was a poor attempt at
19 humor, Your Honor.

20 What I would say, in that case, yes.
21 There's 150 years of case law, precedence that I have a
22 hard time getting around. That is a fundamental
23 distinction which -- between McGuire Woods and my firm,
24 I'm sure the Fourth Circuit will decide this at some
25 point, but that's the fundamental distinction to me.

1 There are a bunch of cases that say if you're going to
2 be condemning something, yeah, you can -- I might
3 disagree with the reason that's not a taking. I think
4 the Supreme Court has said that is a fundamental right
5 that cannot be interfered with by the government and the
6 state can't just define it away. But I would agree
7 there are a lot of cases that say if this is antecedent
8 to condemnation proceedings, then they've ruled it's not
9 a taking.

10 I don't find any case out there that says --
11 that has this statute. There's no requirement there be
12 a taking. And we have a fact pattern where there isn't
13 even a taking. We have a fact pattern where the federal
14 statute says they can't even commence eminent domain
15 proceedings until they have that FERC certificate. It's
16 not the constitution's problem that a federal
17 bureaucracy is we want you tell us where this is going
18 to go before you have a right to go out and figure
19 exactly where it's going to go. I think in the era of
20 Google Earth and that kind of stuff, they can get a
21 pretty good enough sense.

22 So, the question, Your Honor, is no. If
23 this were that case, I would agree I have a fundamental
24 problem. The reason I filed this case is because this
25 case isn't out there. There isn't a statute out there I

1 have found that doesn't even mention eminent domain. We
2 have a separate statute that deals if there is going to
3 be eminent domain. That's the quick take. I'm from
4 Virginia. We're conservative. We love our property.
5 If you ain't doing the quick take one -- actually, you
6 can't do this in Virginia. You have to file your
7 condemnation petition first. Then you've got to wait
8 21 days and then come back and ask me for permission to
9 go on these people's property.

10 THE COURT: But they can't do that in a case
11 where they have to get regulatory approval from the
12 FERC. They can't follow the quick take statute.

13 MR. WALTERS: FERC says you can't condemn,
14 you can't do eminent domain -- let me add something,
15 Your Honor. That's, I think, assuming something that's
16 not in evidence in this case. It's not that FERC doesn't
17 require you to identify your possible route. There's no
18 evidence that FERC requires you to actually go on each
19 of those properties, do a soil resistivity test and dig
20 holes and that kind of stuff before you can come to us.
21 Now, it may be if we get to summary judgment, they say,
22 here's what we have to do to comply with FERC and our
23 expert is going to testify they can't provide the
24 information we need unless we do that, but the federal
25 statute says they can't do eminent domain until they get

1 the CPCN. Somebody at least has said, you know what?
2 They can't do that until they do that. And the state
3 has said, you can condemn without having a survey.
4 Traditional Virginia slow take is exactly that. I guess
5 because it's slow, they're not worried about, oh, we're
6 going to take more than we need to --

7 THE COURT: What about ripeness? They have
8 said they're not going to go on this property. They're
9 going to apply to state court for an order under the
10 statute. They've not gone onto any property yet. Why
11 is this claim ripe, and particularly given the fact that
12 you have under the statute the ability to seek damages?
13 You also have a right to go by inverse condemnation. Why
14 is this case ripe?

15 MR. WALTERS: Sure.

16 First off, ripeness is jurisprudential as
17 opposed to jurisdictional. I'll start at the end of the
18 situation the Court gave us. I don't think there's an
19 adequate damages remedy here. That's what Williamson
20 County said. It's not just is there a damages remedy.
21 Williamson County said -- I should know. I highlighted
22 it all here. I should be able to find it sooner.

23 THE COURT: Page 195. If a state provides
24 an adequate procedure for taking just compensation, the
25 property owner cannot claim a violation of the just

1 compensation clause until it has used the procedure and
2 been denied just compensation.

3 MR. WALTERS: It says you can't get your
4 trespass damages, but you can get actual damages. The
5 Daniels case in the Seventh Circuit and a number of
6 other cases that say if you can't -- what the inverse
7 condemnation says, in essence, in Virginia is diminution
8 of the value of the property. If, in fact, this taking
9 is a fundamental constitutional right and doesn't
10 diminish the value of the property, you have no damages
11 remedy at law.

12 THE COURT: What you're saying is they've
13 got to, because they're not paying for the right to come
14 on and survey -- let's assume no damages. No trees cut
15 down. No holes dug. They're just walking across a
16 corner of your land, an open field. Not anywhere near
17 your house, just an open pasture. They don't damage
18 anything. They walk across it. They shoot their lines
19 and they do their survey. You're saying that that
20 constitutes a taking in that setting and because they
21 ain't paying for it, it violates Fifth Amendment.

22 MR. WALTERS: Correct.

23 THE COURT: So basically, you're saying in
24 order to do a survey, the gas company has to come on and
25 lease your property for a period of time to do the

1 survey. That's what you're saying.

2 MR. WALTERS: Sure. But the dissent in
3 Oglethorpe is saying it as well, Your Honor.

4 THE COURT: But it's the dissent.

5 MR. WALTERS: I agree, and it's also a
6 Georgia case that frankly doesn't matter what --

7 THE COURT: But when you have cases from all
8 over the United States which disagree with what you're
9 arguing, it provides -- this is what the majority in
10 Oglethorpe says. Thus, we hold that a prospective
11 condemnor is not required to a year of condemnation
12 procedures and constitutional provisions for
13 compensation before making a preliminary entry,
14 although, if it engages in damages, it's got to pay for
15 it. That's exactly what the statute says.

16 You just want -- you want two things. One,
17 you say they've got to pay some sort of reasonable
18 value.

19 Let me ask you this. Landowner A. Gas
20 company comes in and says we want to go across your
21 property for the purpose of seeing whether a pipeline
22 can go here. Landowner A says no. And they say, we'll
23 pay you reasonable rental for the day so we can go and
24 survey. Landowner A says no, there ain't no amount of
25 money under which I'm going to allow you to come across

1 my property. Let's say the power company comes across,
2 pays a reasonable rental. Is there a taking in that
3 setting? They're paying something to come across and do
4 the survey. Is there a Fifth Amendment violation?

5 MR. WALTERS: Sure. There's a taking and
6 it's not unconstitutional because they paid just
7 compensation.

8 THE COURT: So all they have to do in this
9 case is rent their property for a day to do their survey
10 and you've got no claim.

11 MR. WALTERS: I don't agree, Your Honor,
12 because the Fifth Amendment says the sovereign has the
13 right to condemn my property for a public purpose and
14 we're glossing that because that wasn't in your
15 hypothetical -- provided there's a public purpose and
16 they pay just compensation. Nobody would have a
17 constitutional claim there because the constitution has
18 been complied with.

19 THE COURT: This whole case is about, as far
20 as you're concerned, about renting the property to do
21 the survey. That's what this comes down to, practically
22 speaking.

23 MR. WALTERS: It comes down to just
24 compensation for the fundamental right to exclude
25 others, yes, sir.

1 I'm trying to think of the name of the case.
2 First Amendment rights. There's no economic value to
3 your First Amendment right, but it has a fundamental
4 value which the Constitution protects.

5 I want to back up for a moment because the
6 Court quoted before the majority in Oglethorpe and
7 pointed out again what I think makes our point, Your
8 Honor, is a prospective condemnor and the Court then
9 goes on to explain in great detail about why when
10 there's going to be condemnation, this sort of pre-take
11 sort of makes sense. There's ultimately going to be a
12 hearing. Why have two hearings when you're only going to
13 need one?

14 THE COURT: That's not what this Court says.
15 This Court says there's no taking there. There's no
16 taking there. The taking only happens later. All
17 they're doing is coming on the property to see and that
18 has been well recognized in the Commonwealth and these
19 statutes.

20 Anything else you'd like to say?

21 MR. WALTERS: No, sir.

22 To the extent the Court lets me --

23 THE COURT: I'll let you respond to what
24 they have to say.

25 Mr. Wilburn, anything you have to say?

1 MR. WILBURN: Just briefly, Your Honor.

2 THE COURT: Mr. Walters talks about the
3 statutory scheme here is very different from the
4 statutory scheme involved in the quick take and these
5 other Virginia statutes. Could you respond to that
6 argument?

7 MR. WILBURN: Yes, Your Honor.

8 It's an inaccurate statement as to both the
9 Virginia statutory scheme and what exists at the federal
10 level under the Natural Gas Act.

11 Counsel is correct there's both a quick take
12 process in Virginia. It doesn't apply to interstate
13 natural gas companies like us. It has no application to
14 these facts.

15 There's a slow take process under state law.
16 It has nothing to do with the survey issue.

25 MR. WILBURN: Well, sort of getting outside

1 --

2 THE COURT: Maybe you could settle this case
3 by doing that. Maybe you can resolve it if you pay them
4 a little bit of money. It ends the issue.

5 MR. WILBURN: I would love it if we can
6 resolve it. I can tell the Court outside of the
7 pleadings, this is not about a day's rental value on the
8 property. It's not. This is a no, the project's not
9 coming. That's why we're litigating this here and
10 elsewhere.

11 THE COURT: I understand this is the first
12 skirmish in an issue that is near and dear to people's
13 hearts and lives. I understand that. I understand
14 that. It is the very first skirmish. I understand
15 that.

16 But this Court is not dealing with the issue
17 of whether a pipeline can come across their property.
18 This Court is not dealing with an issue about whether
19 there's a public need for this. This Court is not
20 dealing with an issue about whether the pipeline goes
21 here or there or there. This Court is not dealing with
22 any of those issues. Those aren't before me. The
23 reasonable issue I'm dealing with is whether the law
24 that allows a natural gas company to go on your property
25 on a temporary basis, conduct a survey, violates the

1 Constitution of the United States. Understand the very
2 limited thing I'm dealing with. I'm not dealing with
3 the issue about whether it's right or wrong to build a
4 pipeline in a certain place. Those issues will be dealt
5 with by other people other than me. The only issue is
6 whether or not this temporary access to the property,
7 without compensation, where there's no damage to the
8 property, violates the Fifth Amendment because it's a
9 taking without compensation. Or it is an unreasonable
10 seizure under the Fourth Amendment?

11 You sit down.

12 I have to ask you a question. I just want
13 to ask your position on this.

14 Let's say for the sake of argument -- I'm
15 going to come down there.

16 (Court left the bench).

17 Let's say just for the sake of argument
18 you've got this piece of property. And this may be just
19 a silly question. But you've got a piece of property
20 and let's say this is the Klemic property and it goes
21 like this and these are other people's properties. The
22 pipeline company comes right here and puts their transit
23 and they come right here and put their transit and shoot
24 the line across the corner of the Klemic property. They
25 don't physically enter it, but they shoot their transit

1 across it.

2 Do you believe in that situation there's an
3 unconstitutional taking?

4 MR. WALTERS: Not unless there are any
5 chickens killed in the process.

6 THE COURT: Sending the transit over the
7 property wouldn't do it.

8 MR. WALTERS: The transit is the physical
9 device that sits there. No, people can look across
10 property.

11 THE COURT: So what's the difference then
12 between them putting the little transit right there and
13 just walking up and running the transit between here and
14 there? What's the difference, in constitutional terms?

15 MR. WALTERS: Sure. Well, that would be a
16 trespass.

17 THE COURT: The statute says it ain't a
18 trespass.

19 MR. WALTERS: Starting with the
20 Commonwealth, there's a trespass. If you have a valid
21 statute that gives somebody the right to walk across
22 your property without permission, then there's no
23 trespass. If there's a statute that's unconstitutional
24 that gives them a right to cross across your property,
25 then there's a Fifth Amendment violation because it's

1 taking my right to enjoy my property.

2 (Court resumes bench).

3 THE COURT: It's just the walking across.

4 MR. WALTERS: Right.

5 In this case, Your Honor -- again, I resist
6 wholeheartedly using survey as -- I like Oglethorpe for
7 various reasons, but it goes on to say this kind of
8 innocuous entry is what we are saying is not a taking.
9 It spends a whole paragraph saying how minor this has to
10 be. It doesn't talk about a 100-acre parcel with a
11 200-foot wide swathe with holes being dug every 50 feet
12 in it.

13 THE COURT: Justice Oliver Wendell Holmes,
14 in 1922, in the Pennsylvania Coal vs. Mahone case,
15 answers that question. He's talking about in that case
16 a regulatory case. He says if the regulation goes too
17 far, it was recognized as a taking. If there's taking,
18 there's just compensation required. If they come on the
19 property and they damage trees; if they come on the
20 property and because there's some suggestion of a
21 historic site or a cultural artifact that they need to
22 look to see whether there's been Native Americans there,
23 they look to see whether or not there's been Civil War
24 there, they have to pay for that.

25 You're saying just the coming on in and of

1 itself violates the Constitution.

2 MR. WALTERS: That's also what Kaiser Aetna
3 says. Simply paddling across there violates the
4 constitution.

5 I realize the Court doesn't agree with me.

6 THE COURT: I'm sorry. I asked this
7 hypothetical about just the transit because I wanted to
8 know the limits of your argument. I appreciate that.

9 I'll ask Mr. Wilburn to stand up and I'll
10 give you a chance to respond, Mr. Walters.

11 Mr. Wilburn, go ahead.

12 It's a fascinating case and an important
13 case. It's important to the parties. It's important to
14 the Commonwealth. It's important to Dominion
15 Transmission and it's important to these landowners.
16 And I'm going to give it the importance to which it is
17 due. I spent a lot of time on this case.

18 MR. WILBURN: Thank you, Your Honor. Just a
19 couple points.

20 Counsel relies on the dissent in Ogletree
21 (sic), and it's exactly that, a dissent. There's not a
22 case that's been cited by the landowners in this action
23 in which a temporary intrusion --

24 THE COURT: He says, wait a minute. All
25 those other statutes contemplate eminent domain or an

1 impending eminent domain proceeding and those statutes
2 are different because this statute doesn't require that.

3 MR. WILBURN: That's just inaccurate and
4 there's not a case that says that either. But even if it
5 were accurate --

6 THE COURT: It's a novel argument Mr.
7 Walters is making.

8 MR. WILBURN: It's a novel argument and it's
9 interesting. It's novel, but it's not supported by any
10 case law or any of the statutes he's relying on.

11 If you look at the statute at issue in this
12 case, there's no requirement in any case that a survey,
13 that entry for survey is antecedent to a condemnation.

14 THE COURT: Oglethorpe, just to his point.
15 We hold that a prospective condemnor. He says because
16 there's no condemnation, because you're not a
17 prospective condemnor and condemnation or eminent domain
18 is not imminent, that these cases are not on point.

19 MR. WILBURN: I think a reading of all the
20 cases, there's not a case among those that says the
21 survey has to be part of a condemnation, which is the
22 argument that's made.

23 If you look at the statute itself, if you
24 want to sort of delve into that issue, 56-49.01
25 incorporates in its very first sentence, 15 U.S.C. 717A,

1 I believe the citation -- I don't have it with me, but I
2 believe the condemnation portion of that statute is
3 717H. So, the idea this project may not ultimately
4 result in a condemnation is farfetched. The
5 condemnation power is contained in the same statutory
6 cite that's embedded in 56-49.01. It's either G or H.
7 I don't have it with me.

8 What it simply provides is where the gas
9 company and the landowner aren't able to agree on the
10 conveyance of the easement that they have the power of
11 eminent domain.

12 The other sort of fundamental problem,
13 counsel criticizes the federal regulatory scheme on this
14 by suggesting it's not the Constitution's problem that
15 these surveys are necessary in order to obtain the CPCN.
16 That's a well-settled body of law on this issue. We
17 cited in our brief. That's 18 CFR 157, 360, 380, and
18 there are others. Those are just examples. That
19 authorize or require the exact type of surveys we're
20 asking for in this case, which I think really are
21 helpful about the statute that counsel is challenging.
22 It incorporates the Natural Gas Act. It specifies the
23 purpose for the surveys, which are those required by
24 regulation, and that's those in the CFR's that we cited.
25 And the Natural Gas Act actually includes a component

1 for eminent domain. So, that argument is not supported
2 by any law.

3 THE COURT: You're saying his argument that
4 there's no contemplation of eminent domain is undercut
5 by the fact the Virginia statute itself references the
6 Natural Gas Act.

7 MR. WILBURN: It incorporates the Natural
8 Gas Act, which in that very citation --

9 THE COURT: Or is it just incorporating the
10 definition of a natural gas company as set forth in 14
11 U.S.C. 717A?

12 MR. WILBURN: I think you can argue it
13 either way, but when you're looking at the construction
14 of the statute, the Court is constrained to try and
15 construe it in a way that's constitutional. However you
16 turn the statute around and look at it, I think counsel
17 is speculating as to ways in which if something is not
18 in the statute happens, it would be a problem. But the
19 Court's obligation --

20 THE COURT: I think he mentioned in his
21 brief building a road for a resort.

22 MR. WILBURN: Right. That's not allowed.
23 That's on the face of the statute. It's to satisfy a
24 regulatory requirement. It's not a regulatory
25 requirement that allows us to build a resort on the road

1 to the beach, which was what was suggested. So setting
2 up straw men to suggest to the Court there's some
3 scenario out there under which --

4 THE COURT: Mr. Walters, I want you to make
5 a note because I want you to address that reference,
6 too.

7 MR. WALTERS: I just made a note right here,
8 Your Honor.

9 THE COURT: I want to hear what you have to
10 say about that.

11 MR. WILBURN: Counsel is suggesting there's
12 some circumstance where Dominion might violate the
13 statute, rendering it unconstitutional, but it doesn't
14 work that way. The statute is either facially
15 constitutional or not. It has to be read in a way, if
16 at all possible, if any reasonable meaning could cause
17 it to be constitutional, Your Honor has to find it as
18 such, and the plain long would be constitutional,
19 consistent with the case law. Everything else is
20 speculation that Dominion would do something not allowed
21 by the statute. In that circumstance, the privilege
22 doesn't attach and there would be a liability.

23 I think it's noteworthy -- I won't go so far
24 as to say a concession, but I think it's noteworthy that
25 counsel recognized that list of exceptions that's set

1 forth in the treatise and in the Restatement and in
2 common law, 15 or 20 exceptions to the right to exclude
3 recognize they exist and the only one that he says
4 doesn't exist without authority is the one we're at
5 issue on today. And it's simply inconsistent.

6 In terms of the permanency issue, Your
7 Honor, there was talk of Lucas and talk of Loretto and
8 these others. Embedded right in the language of the
9 Supreme Court is the reference to permanency. There's
10 not a case out there, there's not a case anywhere in
11 which a temporary intrusion on the right to exclude is
12 compensable.

13 The last thing I'll say on this, unless Your
14 Honor has a question --

15 THE COURT: The Fourth Circuit in -- I can't
16 think of the name of the case -- hold on. It's Presley.
17 That's a temporary case. It cites Place, Fourth
18 Circuit, for the proposition that rather the Fourth
19 Amendment often governs temporary or partial seizures
20 and cites U.S. vs. Place. That doesn't have anything to
21 do -- there's nothing about the facts of Place that have
22 anything to do with our case. That's a case where they
23 searched some luggage somebody had on a bus and they
24 found some contraband and there was a prosecution. The
25 only thing that that case stands for is the notion an

1 intrusion on possessory interest can vary. You have to
2 look at the nature and effect. What's the possessory
3 interest in?

4 They cite the Pepper case. That was a case,
5 interesting case, out of Seventh Circuit in which there
6 was this couple that was living in an apartment and she
7 was at work and he says -- and they had had a falling
8 out and he wanted to go to the apartment to get his
9 stuff out of the house and they had the police go along
10 so that there was state action. He takes his stuff, but
11 he also steals her television and he takes a knife and
12 rips up her couch. Rips it up. The Court found there
13 in that case that there was a permanent stealing of the
14 TV and a ripping up of the couch. So it wasn't just a
15 temporary thing.

16 We've talked about the Gray case also cited
17 by the Fourth Circuit and that is the rifle case.

18 Anything else you want to add?

19 MR. WILBURN: Yes, Your Honor.

20 I point to the Montana Company against St.
21 Louis Mining and Milling. This is a U.S. Supreme Court
22 decision. It's not an entry for survey statute, but in
23 reaching a decision on this case allowing a survey
24 without compensation, they cited with approval the
25 Massachusetts Supreme Court that had found entry for

1 survey constitutional. What the Court held is that if
2 occupancy was reasonably necessary for some purpose, if
3 it's temporary and there's no unnecessary damage -- I'm
4 paraphrasing -- it carried no right to compensation.

5 That's a case where a Court ordered an
6 inspection of mines, a survey of mines to resolve
7 competing claims. It's not our fact pattern, but one of
8 the mine owners argued that that violated their right to
9 exclude. It was a compensable, constitutional right and
10 the Court disagreed. That's similar to what we have
11 here. I would --

12 THE COURT: That was around the turn of the
13 last century.

14 MR. WILBURN: It was, but it really
15 recognizes, I think, how long this body of law has been
16 in place.

17 Counsel's argument, he said it several
18 times, is based on, and I wrote it down, his belief that
19 there's a fundamental right to exclude utilities for
20 surveys. The problem with that position is it supports
21 all of his claims and it's unsupported in the law.
22 There's no case that says that.

23 The last thing I'd suggest to Your Honor,
24 I'd ask you to take up -- I guess the state actor issue
25 is an important one. One of the concerns we have with

1 the inconsistent pleading the plaintiffs have made is
2 there's, obviously, I think, sort of an easy way out,
3 which is to sustain the motion to dismiss because they
4 haven't used the words to plead state actor. But that
5 arguably doesn't resolve the facial challenge which is
6 so important to Dominion and the people here --

7 THE COURT: I'm going to take it up. I
8 thought about just saying he hadn't properly pled state
9 action and therefore, I could just dismiss it and give
10 him leave to amend, without addressing the taking,
11 without addressing the unreasonable seizure, without
12 addressing the Fourteenth Amendment. I'm going to deal
13 with all those on the facial challenge to the statute.

14 He raises an interesting claim and I will
15 deal with the claim on the motion to dismiss and we'll
16 see what goes from there.

17 MR. WILBURN: Thank you.

18 Do you have any other questions?

19 THE COURT: No.

20 Mr. Raphael, do you want to say anything
21 else?

22 MR. RAPHAEL: On the state action piece of
23 it, I appreciate your last remarks. It's pretty clear he
24 could amend to add a declaratory judgment action.

25 THE COURT: He could amend, I think, but it

1 seems to me that all that would be doing is kicking this
2 can down the road a little bit. I think the Court
3 should deal with the issues that are raised.

4 MR. RAPHAEL: That's exactly right.

5 THE COURT: Whether I do that because I
6 don't think he's properly pled state action or whether I
7 deal with it through the lens of an amendment would be
8 futile or not futile under Foman vs. Davis, I could do
9 that. I'm going to look at the merits of the challenge
10 to the statute and write an opinion making a judgment on
11 this and the case will either go forward if I deny the
12 motion to dismiss. If I grant the motion to dismiss,
13 there's this group in Richmond that reviews what I do
14 and decides whether or not I make error.

15 MR. RAPHAEL: Thank you, Your Honor.

16 With regard to the issue there's really no
17 difference between a facial and an as applied challenge,
18 there's reference to Chief Justice Roberts on that and I
19 think the most recent salient case on that point is Doe
20 vs. Reed, which is 561 U.S. 186.

21 THE COURT: 561 U.S. 186.

22 MR. RAPHAEL: The Court discusses what some
23 justices have suggested, that there may be grey areas
24 between a facial and an as applied challenge. But I
25 think the salient language is at page 194 where the

1 Court says --

2 THE COURT: Hold on a second. Let me pull
3 that up.

4 Go ahead.

5 MR. RAPHAEL: I don't have the page in front
6 of me, but the text is that the label is not what
7 matters. The important point is that plaintiff's claim
8 and the relief that would follow, dot, dot, dot, reach
9 beyond the particular circumstances of these plaintiffs.
10 They must therefore satisfy the Supreme Court standards
11 for a facial challenge to the extent of that reach.

12 The teaching of this is that if you were
13 trying to argue the statute is unconstitutional on facts
14 beyond you, which is what they're claiming, it's
15 facially invalid, you have to satisfy the standard for a
16 facial challenge, which is it has to be unconstitutional
17 in every application.

18 The suggestion was made that ripeness is not
19 an Article III issue, it's just a prudential matter. I
20 don't believe that's right. Ripeness is really the
21 concept of standing in time. If the claim is not ripe,
22 they would be asking the Court to decide a matter that
23 is not a case or controversy yet because the facts are
24 not yet presented. He may be confusing the idea that
25 you can have an exception to the mootness doctrine when

1 a case is capable of repetition yet evading review. But
2 I believe ripeness is an Article III requirement.

3 The suggestion was made that this statute is
4 different because there's no actual condemnation, and
5 there may not be one. At page 17 of our brief, we set
6 out, at the top of that page, footnote 63 through 65,
7 the cases that deal with this notion of gee, what if you
8 decide you're not going to take the property, does that
9 make a difference? The answer is that it doesn't. For
10 example, as the Court said in the Indiana Court of
11 Appeals, Indiana Michigan Electric Company vs.
12 Stevenson, footnote 64, that the utility will not be
13 forced to engage in a wasteful expenditure of the
14 rate-payer's money by blindly purchasing a pig in a
15 poke, which is what you'd have to do if you have to buy
16 the land to survey it, not knowing whether you needed to
17 take it or not.

18 We also cited the North Dakota Supreme
19 Court's opinion in Square Butte Electrical Cooperative,
20 where the Court said that requiring the utility to prove
21 prior to committing its survey and test that the land's
22 best route would be to require it to act prior to the
23 ascertainment of knowledge necessary to establish such a
24 fact and might result in a useless act.

25 Perhaps some of the best language on this

1 point comes from the Supreme Court of New Hampshire's
2 decision in that really old case, Orr vs. Quimby, which
3 is 1874. At page 598, the Court said -- and this was
4 responding to the notion you'd have to pay for damage
5 that might occur before you go on the land to survey it.
6 The Court said at page 598, the practical effect of
7 holding the defendant could not enter upon the
8 plaintiff's land for the necessary purpose of the coast
9 survey or that he could not do any substantial entry
10 thereafter he had entered without previously paying or
11 securing him for the damage that he caused would be to
12 deny the right all together.

13 The point the Court made, and there's other
14 language to this effect, it would be completely
15 impractical to require a utility to pay to survey land,
16 pre-condemnation. You would effectively destroy the
17 right all together.

18 The issue of the Montana case came up.
19 That's an 1894 case, the U.S. Supreme Court case, the
20 mining case. We cited that in our papers. That's a
21 really good citation. I completely agree with my counsel
22 on Dominion for that.

23 I would point out, Montana, if you want to
24 address this in your opinion, Montana was followed by
25 the Fourth Circuit in Belcher vs. Bassett Furniture.

1 This is footnote 26 of our brief.

2 THE COURT: I looked at that Bassett
3 Furniture case.

4 MR. RAPHAEL: The point was a Court order
5 that requires somebody to go on someone's land is not a
6 taking because there's not a right to exclude in that
7 situation. So it's another application of the principle
8 that you don't have a right to exclude in all
9 situations.

10 Kaiser Aetna. Mr. Walters tried to make the
11 argument that Kaiser Aetna applies, and I know you're
12 all over on this one. I would just cite at page 180 of
13 Kaiser Aetna, the Court points out if the government
14 wishes to make what was formally coop a pond into a
15 public aquatic park after petitioners have proceeded as
16 far as they have here -- they turned it into a marina --
17 without invoking its eminent domain power and paying
18 just compensation, requires them to allow free access to
19 the dredged pond while petitioner's agreement with the
20 customer calls for an annual \$72 regular fee. So they
21 did all this work to build a pond. They charged \$72 to
22 customers and the government took that away by saying
23 anybody can use it without paying.

24 THE COURT: And they took it away
25 permanently.

1 MR. RAPHAEL: That's exactly right.

2 THE COURT: By imposing a navigational
3 servitude on it.

4 MR. RAPHAEL: That's exactly right.

5 You asked Mr. Walters to answer a question
6 and he made a note on that. I suggest the Court ask him
7 the other question I mentioned earlier.

8 THE COURT: Page six of his brief?

9 MR. RAPHAEL: Yes.

10 Is it his position that the other entry for
11 service statutes are unconstitutional under his theory
12 of the right to exclude? He's hedged on that.

13 THE COURT: Well, we'll ask him.

14 Can you make a note of that one, too, Mr.
15 Walters? We'll ask you that one, too.

16 MR. RAPHAEL: We greatly appreciate the
17 attention you've given this and a written opinion will
18 go very far, I think, in clarifying the law in this area
19 and confirming the law in this area.

20 THE COURT: At least until the Fourth
21 Circuit decides it.

22 MR. RAPHAEL: I would urge the Court to
23 focus on the issue of the common law right to exclude
24 under the Virginia law, common law under Virginia law.
25 There just isn't one in this context.

1 THE COURT: Until yesterday when I was
2 looking at your appendix, I did not know something --
3 well, there are a lot of things I don't know, but I
4 really didn't know this. I didn't know there was a law
5 school in Winchester. There's a -- this Henry St.
6 George Tucker thing that you put in here that I found,
7 it was an address he made at the Winchester School of
8 Law. I just have to find the page. Commentaries of the
9 law and the laws of Virginia comprising the substance of
10 a course of lectures delivered to the Winchester Law
11 School by Henry St. George Tucker, Fourth Judicial
12 Circuit, and that was published in 1846, which I did not
13 realize that there was a Winchester Law School.

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14           Just another fascinating nugget we get to
15   look at in this case.
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16 MR. RAPHAEL: I didn't know that either.

17 Professor Hamilton Bryson told me the other day that the
18 Henry St. George Tucker treatise is the first one that
19 was a treatise about Virginia law specifically. I
20 thought that was interesting.

21 THE COURT: You can't go to law school in
22 Virginia without hearing Henry St. George Tucker.

23 MR. RAPHAEL: I think he was the grandfather
24 of the father of the Tucker Act in Congress.

25 If the Court has no further questions --

1 THE COURT: We have at least two questions
2 for Mr. Walters.

3 MR. RAPHAEL: Thank you, Your Honor.

4 THE COURT: Answer Mr. Raphael's question
5 about, do you believe these other entry for service
6 acts, other than the one at issue here, are likewise
7 unconstitutional?

8 MR. WALTERS: Without knowing the specific
9 one referring to at this point, if that statute provides
10 a right to survey that is not antecedent to a
11 condemnation proceeding, our argument would be the same,
12 Your Honor, yes.

13 THE COURT: I understand your point on that.

14 MR. WALTERS: I'm not trying to be devious
15 or inconsistent.

16 THE COURT: You just don't have them off the
17 top of your head.

18 MR. WALTERS: Right, but our argument would
19 be the same. If it allows them to come on not requiring
20 compensation for a public purpose, our argument would be
21 the same.

22 THE COURT: What about the reference in the
23 statute Mr. Wilburn made to the Natural Gas Act, 717A?

24 MR. WALTERS: Well, Your Honor, it doesn't
25 incorporate the Natural Gas Act. What it says is any

1 firm, corporation or partnership organized for the bona
2 fide purposes as operating as a natural gas company as
3 defined in 15 -- it's just saying we're using this term
4 natural gas company. What it means is the same
5 definition as in another statute. There's no rule of --
6 whether I borrowed that, I have incorporated that. Not
7 only that section, but all the other sections, whatever
8 Acts I'm borrowing the definition from. So, the answer
9 to that one is easy. We're using this definition, this
10 name, this term and it just means the same thing it
11 means in other statutes.

12 THE COURT: Look at the first line of the
13 statute. Any firm, corporation, company or partnership
14 organized for the bona fide purpose of operating as a
15 natural gas company. What are those purposes? They
16 deliver natural gas. How do they deliver it? Through
17 pipes. Doesn't that, by definition, talk about exactly
18 what you're talking about in this case? They've got to
19 put the pipe somewhere. Natural gas doesn't just fly
20 around. It goes through pipes.

21 MR. WALTERS: Let's continue reading the
22 statute, Your Honor, because I don't mean to be pedantic
23 there. What it says is the company defined in that way
24 may make such examinations, tests, hand auger borings,
25 appraisals and surveys -- so it's not just a survey

1 statute -- for its proposed line or location of its
2 works as are necessary, one, to satisfy any regulatory
3 requirements; and two, and it lists a whole bunch of
4 other reasons you can do it -- for the selection of the
5 most advantageous location or route, the improvement or
6 straightening of its line or works, changes of location
7 or construction or providing additional facilities. And
8 sure, I pick some hyperbolic example, you know, if they
9 want to construct a road to their beach side thing. But
10 saying to provide additional facility is pretty
11 open-ended, Your Honor. It doesn't tie it to facilities
12 related to just your natural gas pipeline.

13 THE COURT: Mr. Raphael argues you have to
14 look at the statute the other way. When I'm doing the
15 facial challenge, I have to look at it and say -- you're
16 arguing that I have to look at it and say, well, it's
17 too broad and providing additional facilities is
18 undefined. He says if there's any way to view it as --
19 if there's any scenario under which it's constitutional,
20 I have to uphold it.

21 MR. WALTERS: Sure. And typically, what the
22 courts do then is write an opinion saying here are the
23 limitations I'm writing into the statute. So, to go
24 back to the Court's first question, if Your Honor wrote
25 an opinion that says I'm interpreting this statute as

1 saying surveys antecedent to eminent domain proceedings
2 for the purposes of determining what property to take in
3 that eminent domain proceeding and subject to damages,
4 remedy for any damages caused, that's how I read the
5 statute, you're right. I'd pretty much say that answers
6 the concerns we're addressing in this case.

7 Correct, the Court could construe it more
8 narrowly, but its decision must set out the way in which
9 its considering that. Again, if you get to the point
10 where you're making an entirely different statute,
11 particularly if it's a federal court reviewing a state
12 statute and saying, well, I'm going to take a blue
13 pencil to this one until I get to something that
14 survives the Constitution, certainly is the Court can do
15 whatever it wants in that respect. But I think it's not
16 the same as saying, oh, if I can come up with any
17 scenario where this might be plausible, I'll just say
18 the statute as written is fine.

19 THE COURT: I understand that argument.

20 MR. WALTERS: I come from Fairfax. My
21 accent may be hard to understand sometimes. I don't
22 recall ever saying there's a fundamental right to
23 exclude utilities. I said there's a fundamental right
24 to exclude others from the property. That's not me.
25 That's the Supreme Court saying that.

1 Again, if this were antecedent to
2 condemnation -- nobody needs to be a pig in a poke. Nor
3 does the General Assembly that says if it's a slow take,
4 here's how you do it. You've got some time. Make sure
5 you don't take too much.

6 One last thing on the 12(b)(6) issue, Your
7 Honor, is what may be out there about what they have to
8 do and how they comply, if that's in fact all this case
9 is going to be about is this very narrow as applied
10 thing is the fact this Court doesn't have yet.
11 Regulations may say we need certain things. There's no
12 evidence, certainly nothing pled in this case about what
13 method needs to be used to get there.

14 One final, final point, Your Honor, is a
15 distinction I would suggest is critical; the distinction
16 between temporary and intermittent. What Kaiser Aetna
17 and Causby deal with are situations where the intrusion
18 is intermittent, four percent of the time for a matter
19 of seconds, seven percent of the time for a matter of
20 seconds in Causby, and whenever people may in the future
21 choose to enter, in Kaiser Aetna. Intermittent and
22 temporary in the Fifth Amendment sense are not the same.
23 It's if that intermittent taking continues indefinitely,
24 that is a permanent taking and that's what 56 says. It
25 says any of these statutes will be intermittent. It may

1 be a day or a matter of days, but the statute says you
2 can continue to do that forever as long as you meet the
3 criteria in this statute. It's not, oh, come on Mr.
4 Walters, you're just going to be there for a day. They
5 may have said we need more stuff; or gosh, power
6 failure, we lost our data, we need to do it again; or
7 that was for the pipeline and now we want to straighten
8 it. Or now we want to build some other facilities to go
9 with that. So it is a statute with no sunset provision,
10 no six-month lease like Causby. It goes on in
11 perpetuity, giving them the right to come on for a day,
12 however many days, over and over again until the cows
13 come home or the chickens die, whatever the analogy is.

14 For those reasons -- well, you know what we
15 want, which is to have the Court rule on the motion and
16 we look forward to reading the Court's decision.

17 THE COURT: Thank you, counsel.

18 Obviously, you all have done a masterful job
19 of looking at the law, briefing the issue. I greatly
20 appreciate your arguments. I had a number of questions
21 that I wanted to pose as I looked at the briefs and the
22 law in this case. Each of you have given me some other
23 things to think about. Each of you have given me a few
24 other cases to look at and like I said, I'm not going to
25 decide the matter today from the bench. I am going to

1 issue a written opinion. I can't find a recent federal
2 court opinion on this subject going back to the middle
3 of the 19th century. So I will write an opinion on
4 this. It's an important issue to the parties. I will
5 devote substantial effort and study to make sure that at
6 least as far as I'm concerned that I get it right and
7 that we're doing justice here and that we're following
8 the law and I will do that.

9 I'm not sure exactly how long it will take
10 me to do this, but I will get to it just as soon as I
11 can.

12 I will say it's been a pleasure. I'm not
13 sure I have ever -- you may have argued before me, Mr.
14 Raphael, but Mr. Wilburn, Mr. Walters have been
15 well-prepared and smart and who understand the issues
16 and can help frame the issue for the Court to try to
17 resolve. Thank you all so much.

18 I'll get a written opinion out just as soon
19 as I can.

20 Is there anything else I can do for the
21 parties?

22 MR. WALTERS: Nothing from us, Your Honor.

23 MR. WILBURN: No, Your Honor. Thank you.

24 MR. RAPHAEL: Thank you, Your Honor.

25 THE COURT: Appreciate it.

1 Ask the Marshal to declare a recess.
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5 "I certify that the foregoing is a correct transcript
6 from the record of proceedings in the above-entitled
7 matter.

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9
10 /s/ Sonia Ferris

April 16, 2015"

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